BATE

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BY

JOHN PAWLEY BATE,

READER OF INTERNATIONAL LAW, ETC., IN THE INNS OF COURT; SOMETIME FELLOW OF TRINITY HALL, CAMBRIDGE.

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CONTENTS.

NOTES ON THE DOCTRINE OF RENVOI

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PRIVATE INTERNATIONAL LAW.

I.

1. A doctrine, of a revolutionary character, has of late been knocking at the doors of the English system of law, to which the not entirely apt name of the Renvoi-theory has been given. It may be thus explained: A question is raised in a Danish court as to the testamentary capacity of a Danish subject domiciled in Italy. The law of the Danish Forum refers the matter to the law of the person's domicil, *i. e.*, to the law of Italy; the Italian Code says that such a matter is to be governed by the law of a foreigner's nationality, *i. e.*, by the law of Denmark. The Renvoi-question is to decide between the two following alternatives[1] (in the absence of express legislative instructions to the judge):—

(i) Denm. LFor. → Ital. LDom.

(ii) Denm. LFor. → Ital. LDom. → Denm. LNat. (*i. e.*, in this case, LFor.).

[1] The writer appeals to the forbearance of the reader. It will be necessary, in the course of the following pages, to make repeated use of the phrases Private International Law, Law of the Forum, Law of the Domicil, Law of the Nationality. As the writer's object is scientific and not literary, he proposes to employ respectively the abbreviations, I.P.L., LFor., LDom., LNat. Further, as it will repeatedly be necessary to deal with a case where, *e. g.*, an English judge is directed by his rules of Private International Law to refer a given matter to the Italian law as the law of a party's domicil, and this latter law, in its turn, directs that the matter be governed by the law of the Forum as being the law of the party's nationality, the writer proposes to represent this graphically as follows: Eng. LFor. —→ Ital. LDom. —→ Eng. LNat. The last phrase, when mentally expanded, would be "English law as the law of the Nationality."

If the reader consents to conquer the irritation which this will cause at first, he will soon (so the writer believes and hopes) agree that this, admittedly inartistic, method is justified on grounds of convenience.

If (i) be the correct doctrine as to what ought to happen, the purely internal law of Italy is applied (and testamentary capacity is acquired at 18); no notice is taken of the Italian rule by which a foreigner's capacity is dependent on his national law.

If (ii) be correct, the law of Denmark (which takes 21 as the required age) ultimately determines the matter, *i. e.*, by "Renvoi" from the law of Italy. The phrase "Renvoi-theory" is a short mode of indicating the doctrine which approves of (ii) and not of (i).

The examples given above might just as well have been :—

(i) Ital. LFor. → Denm. LNat.

(ii) Ital. LFor. → Denm. LNat. → Ital. LDom. (*i. e.*, LFor.)

Further, the third law in (ii) is not necessarily identical with the first law. If the original question had come before an English court, instead of a Danish, the sequence would be :—

(iii) Eng. LFor. → Ital. LDom. → Denm. LNat.

The phrase "Renvoi" is clearly inapt in (iii), for there is a sending to a third law and not a "sending-*back*" to LFor.: the phrase is often used, however, to cover case (iii). In Germany a verbal distinction is correctly drawn: (ii) is a case of *Rückverweisung*, (iii) is a case of *Weiterverweisung*.

There need be no limit, in a case of Renvoi, to the number of laws involved. Suppose that a Danish court has to deal with a contract made in Italy between two persons domiciled in France but subjects of one of those American States whose law makes capacity depend on the law of the place of contract: the sequence might be—

(iv) Denm. LFor. → Fr. LDom. → Amer. LNat. → Ital. LActus.

2. Those who accept the Renvoi-theory do so in differing degrees—

(a) Some accept it in all cases.

(b) . . . . . case (ii) only—*Rückverweisung*.

(c) . . . . . and, then, only in matters relating to the "personal statute" (Family Law, Status, Capacity; Movable Succession).

(d) Some law-makers accept Renvoi, but only when a matter is thus sent back to the law of their own country.

(e) Some theorists, while objecting to the Renvoi-theory, approve of the results which it produces.[1]

3. The Renvoi-question implies that there is a difference between the rules of I.P.L. adopted by two States with regard to the same matter. In the early days of the science, however, the rules of I.P.L. were, in theory at any rate, uniform; they were conceived of as constituting universal law adopted by all individual systems *ex comitate:* in such circumstances there could be no Renvoi-question. In the 19th century it became finally apparent that this uniformity was impossible even as an ideal. Fundamental conceptions began to diverge; this was especially so in matters of the personal statute (Status, Capacity, Family Law; Movable Succession);

[1] Suppose Eng. LFor. refers the regulation of a succession to the law of France as LDom., but the French law would itself apply to that succession Eng. LNat. The theorists in question would say that, the French law being unwilling to govern the succession, the reference made to it by the English law has failed, and that, in consequence, there is nothing for the English court to do but to apply its own law as LFor. This leads to the same result as the Renvoi-theory proper, and it is often spoken of as a variety thereof; it is obviously a case rather of falling back than of being sent back, and a correcter name, based on the attitude of that law to which the abortive reference is made, is the *désistement* theory. The graphic mode of representation adopted herein, is strictly appropriate only to the Renvoi-theory.

in these matters domicil ceased to be the universal criterion, nationality being, by many systems, adopted in its place. This made the Renvoi-question possible: for if we assume that a judge of State A is directed by his rules of I.P.L. to apply to a given jural relation the law of State B, a further question may arise if the I.P.L. rules of State B, differing from those of A, consider the matter to belong not to the law of B but to the law of A or of a third State, C. The first traceable appearance of this phenomenon seems to have been in an English court in the year 1841; it was not, however, until after the year 1878 that it began to be a very conspicuous object above the legal horizon and, even then, it was on the Continent and not in England that practical lawyers concerned themselves therewith.

The Renvoi-theory, in one form or another, has made some progress on the Continent and a considerable literature has there been formed round the question. Later on in this pamphlet, by quotations and summaries, some of the views prevalent on the Continent, *pro* and *con.*, will be set out. In England there is a comparatively trifling amount of case-law in which the theory is, directly or indirectly, regarded with favour, and, but for Mr. Westlake's contributions to the discussions of the Institute of International Law, an entire absence of theoretical discussion.

4. *Illustrations of Renvoi.*—Before proceeding further it may be well to set out a few actual cases in which the theory has been invoked.

(a) *Court of Appeal, Douai*, 1899. Joseph Anderson was born at Nottingham, England. In 1852, being then a widower, he settled in France, and in 1861 he married a French lady in France. He died in 1893, a British subject domiciled in France: his wife and children of both marriages survived him. By a will made in French form in 1883 he gave all his property to his widow. We will limit our consideration to the movable property in France. The French court held (i) that the succession thereto was regulated by his LNat.:

(ii) "Que d'après la loi anglaise, les biens meubles sont soumis à la législation du domicile du défunt à l'époque de son décès; que Joseph Anderson . . . possédait . . . le domicile exigé par la loi anglaise, bien qu'il n'eût pas obtenu du gouvernement français l'autorisation[1] de se fixer dans notre pays;" (iii) "Que, par conséquent, aux termes de la législation anglaise, c'est la loi française qui doit régir sa succession mobilière."

The court, that is, found that Eng. LNat. governed the succession, but that this law sent the matter back to French LDom; then the court declared to accept such Renvoi, and thus applied French law. The consequence was that the testamentary disposition in favour of the widow was successfully challenged under the French Civil Code by the children of *both* marriages. The alternative solution, involving a rejection of the Renvoi, would have consisted in the simple application of internal[2] English law as LNat. Under this law Mr. Anderson would have been able to leave everything to his widow, as he purported to do. (Clunet, 1899, p. 825.)

(b) *Civil Tribunal of Dieppe, 1896.*—Mrs. E. brought an action for divorce against her husband before this tribunal. She alleged that she and her husband, though British subjects, were domiciled in France, and, at any rate for the purposes of this illustration, this may be assumed to have been the case. Unable to show such grounds for a divorce as would have been recognized by internal English law, Mrs. E. claimed to be allowed to rely on grounds which would have been adequate by the internal French law. Her counsel reasoned as follows: (i) Divorce is regulated by LNat. (ii) By the national law in question, *i. e.*, English law,

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[1] The allusion here is to Art. 13 of the French Code Civil: "L'étranger qui aura été "admis par l'autorisation du Président de la République à établir son domicile en France, "y jouira de tous les droits civils, tant qu'il continuera d'y résider." It may not be out of place to explain here that the usual interpretation of this Art. is that domicil *jure gentium* in France is inadequate to originate rights under French law, unless there is also a governmental authorisation to establish a domicil in France. An unauthorised domicil may, however, indirectly cause the application of French law by the adoption of Renvoi, as in case (a) above. See Clunet's *Journal*, 1902, p. 858, for another such case.

[2] By this is meant the law of England without any reference to its rules of I.P.L. To the rules of I.P.L. adopted by any given State the phrase "Conflict-rules" is sometimes applied herein.

divorce is regulated by LDom., *i. e.*, there is a Renvoi from the English to the French law, and the French courts ought to accept it. "No," said the court, "il ne serait pas rationnel d'accepter le renvoi à la loi française, que le législateur a cru devoir précisément écarter," *i. e.*, the framer of the French Code has definitely withdrawn the matter from the cognisance of the French law in favour of LNat., and it would be ridiculous for a French court to allow the English law to nullify the precepts of the French legislator. (Clunet, 1899, p. 360.)

It will be noticed that in case (a) Renvoi was accepted, and that in case (b) another French court, almost simultaneously, rejected it.

(c) The illustrative cases given above relate to the allied subjects of Family law and Inheritance. It will be well to add an example or two relating to Capacity. (i) In 1892 the Imperial Court of Germany dealt with the capacity of a Prussian, domiciled in Saxony, to make a will during madness. The Prussian law, as LFor., referred to the Saxon law, as LDom.; the Saxon law referred to LNat. (Prussian). The Imperial Court declared that the Renvoi ought to be accepted and that testamentary capacity was in the given case to be determined by Prussian law. (*Zeitschrift f. internat. P. u. S.-R.*, II, p. 469.) (ii) In 1876 an Englishman married a Frenchwoman: in 1888, their domicil being then French, the wife bought goods from a Parisian tailor: and in 1893 the Civil Tribunal of the Seine was called on to say whether the lady was liable for the price of the goods. Judged by internal French law she would not have possessed capacity to bind herself alone; judged by the internal English law she would have been capable—or so the Tribunal interpreted the Married Women's Property Act 1882. Counsel for the lady set up the following:—Fr. LFor. → Eng. LNat. → Fr. LDom., and argued that she was not liable to pay the sum claimed. The court declined to accept this Renvoi, and, applying LNat. without Renvoi, found against her. The judgment contained the following noticeable passage:—

"En décidant que la loi applicable à l'état et à la capacité des étrangers en France est leur loi nationale, le législateur français a considéré que l'état et la capacité des personnes étant une dépendance étroite de leur nationalité, cette loi est mieux placée que toute autre pour apprécier les conditions d'où la règle juridique doit dériver, et qu'elle doit être observée par des motifs supérieurs de raison et de justice. Mais, exposant ce principe, le législateur n'a pas en vue la règle de droit international admise en cette matière dans la législation étrangère, puisque lui-même, dans l'exercice de sa souveraineté, établit cette règle et donne la solution de conflit de la loi française avec les lois étrangères, en disposant que les étrangers sont régis en France par leur statut personnel et en ordonnant aux juges français de leur appliquer leur loi nationale." (Clunet, 1893, p. 530.)

(d) An important section of the adherents of the Renvoi-theory limit its operation to those departments of law from which we have hitherto taken our examples, *i. e.*, to the departments of Family law, of Capacity and Status, and of Succession, so far as they depend upon the "personal statute." There is, however, nothing in the theory as stated by others of its adherents to prevent its general operation throughout the whole field of law. The following case is mentioned in *Annuaire de l'Institut de droit international*, Vol. XVII, p. 224. An action was brought in Hamburg upon a bill drawn payable in Chicago. The defendant pleaded extinctive prescription. According to German law the question of prescription is decided by the law of the place of payment (Chicago), but the law of Chicago refers it to the law of the forum (German). The Supreme Court of Leipzig refused to allow the acceptance of this Renvoi and applied the law of Chicago.

These cases will show that the question of Renvoi is a fundamental one in the ever-increasingly important domain of I.P.L.; according as it be answered one way or the other, so have we to apply correspondingly different principles when, in that domain, we pronounce on the validity of marriage, or the possibility of divorce, or the legitimacy of a child; questions arising with regard to the succession to a deceased,—grants of administration, validity of wills, modes of distribution—must be diversely answered according to the doctrine which ultimately prevails, and this not only because these questions

of succession may depend upon such matters as those just referred to (marriage, legitimacy, &c.), but quite independently thereof; nay, the problem of Renvoi if stated in its widest form is at the basis of all civil international business, and, according as it receives this or that solution, so may we have to declare a given person capable or incapable of contracting, or the formalities of a given legal act to be adequate or inadequate.

5. It will be convenient to give here a formal enunciation of the Renvoi-question. That given in (a) below, is an enunciation by an opponent of the Renvoi-theory, that in (b) by one of its advocates: both were propounded at discussions of the Institute of International Law.

(*a*) Quand un législateur abandonne à une loi étrangère la détermination d'un point de droit, demande-t-il à cette loi de décider quelle loi sera applicable ou cherche-t-il directement dans cette loi quelle solution doit recevoir le point de droit douteux?

(*b*) Quand le législateur, seul compétent d'après les principes du droit international pour régler une question de droit privé, [*e. g.*, LNat., to which the question is duly referred by LFor.] abdique et renvoie à une autre loi [*e. g.*, LDom., which may or may not be LFor.] pour la solution de cette question, est-ce cette dernière loi [LDom.] qui doit prévaloir dans le pays tiers [in the State to which the Forum belongs] ou bien doit-on y appliquer malgré ce renvoi le droit interne du législateur seul compétent d'après les règles du droit international?

II.

6. What has English law said in answer to these questions? Very little. It cannot be said to have either accepted or repudiated the Renvoi-theory in general. In a few cases it has, indeed, given answers favourable to the theory, and these it is now proposed to set out; but it will be seen that they can fairly be described as special cases, not justifying any general statement.

The first three cases are considerably earlier than any foreign case which the writer has met with: they are of the years 1841, 1844, and 1847 respectively, while the earliest cases referred to in the foreign legal literature which he has consulted are of the dates 1856 (Court of Guelderland, Holland) and 1861 (Court of Lübeck).

(1)[1] *Collier* v. *Rivaz* (Prerogative Court of Canterbury, 1841; 2 Cur., p. 855). A British subject died domiciled, in the English sense of the word, in Belgium. Testamentary papers were found, executed by him in accordance with the forms of the internal English law, but not in accordance with the forms of the internal law of Belgium, his place of domicil. Sir H. Jenner admitted the papers to probate on the strength of affidavits of Belgian lawyers that, the deceased not having acquired in Belgium an *authorised* domicil, the Belgian courts would not apply to his succession the dispositions of their local law but would leave it to be governed by the

[1] The case of *de Bonneval* v. *de Bonneval* (1838, 1 Curt., p. 857) is sometimes cited (*e.g.*, by Nelson, p. 187) as a case in which the doctrine of Renvoi was accepted. There is no warrant for this. The court said (p. 858): "The simple question is whether the deceased was domiciled in France or in this country. On that point it will depend by the laws of "which country the validity or invalidity of the will is to be tried: for it is now settled ". . . that the law of the place of domicil . . . governs the . . . succession to "personal property." And the court, having decided that the deceased was domiciled in France, pronounced "that the Courts of that country are the competent authority to "determine the validity of the will and the succession to his personal estate; and, as in the "case of *Hare* v. *Nasmyth* (2 Add. 25) the Court suspends the proceedings here, as to the "validity of the will, till it is pronounced valid or invalid by the tribunals of France."

law of England. Sir H. Jenner said (p. 858): "It does not "follow that, Mr. R. being a domiciled subject of Belgium, "he is therefore necessarily subject to all the forms which "the law of Belgium requires from its own native-born "subjects. I apprehend there can be no doubt that every "nation has a right to say under what circumstances it will "permit a disposition . . . to be entered into by persons "who are not native-born but who have become subjects "from continued residence; that is, foreigners who come to "reside under certain circumstances without obtaining from "certain authorities those full rights which are necessary to "constitute an actual Belgian subject. Every nation has a "right to say how far the general law shall apply to its own "born subjects and the subjects of another country; and "the Court sitting here to determine it, must consider itself "sitting in Belgium under the particular circumstances of the "case . . . . (p. 863). I am of opinion, that notwithstanding "the domicile of Mr. R. must be considered to have been in "Belgium . . . . yet that foreign country in which he was "so domiciled would uphold his testamentary disposition if "executed according to the forms required by his own "country. I am therefore . . . bound to decree probate."

(2) *Maltass* v. *Maltass* (1844, 1 Robert., p. 67). In this case the question was as to the validity of a will made by a British subject resident in Turkey; the will was in the form required by internal English law. What was his domicil at death? Either Turkish or (by transmission from his father) English. For the following reasons, however, the court did not think it necessary to decide this question: "This inquiry," said the court, "will become unnecessary if it should turn out that "with regard to this individual succession, the law of Great "Britain and of Turkey is the same; for when we speak "of the law of Domicil, as applied to the law of succession, "we mean, not the general law, but the law which the "country of domicil applies to the particular case under "consideration. Such law may be totally different as applied "to a natural-born subject of the country, as exemplified in

" the case of *Collier* v. *Rivaz*." In the case under consideration treaties existed between the United Kingdom and Turkey which in the opinion of the court applied to the case, and by which the succession of an English subject dying within Turkish dominions was to be regulated by English law. This is, then, not a case of Renvoi, for, in the event of Turkish domicil being established, the matter would come under English law, not by remit from the law of Turkey but by virtue of the treaty. The case is set out because of the *dictum*.

(3) *Frere* v. *Frere* (1847, 5 Notes of Cases, p. 593). In 1826 the Right Honourable J. Hookham Frere, being domiciled in Malta, made a will in England in English form. He died in 1846, still domiciled in Malta. Sir H. Jenner Fust, in the Prerogative Court of Canterbury, refused to declare the will void, although the municipal law of Malta required the presence of at least five witnesses, at any rate for wills made in Malta. The evidence before the court was that the Maltese courts would not deem a will, made outside Malta by a person domiciled in Malta, to be void, if it complied with the formal requirements of the *lex actus*.

(4) *Bremer* v. *Freeman* (1856 in the Prerogative Court of Canterbury, Deane, p. 199; 1857 in the Privy Council, 10 Moo. P. C., p. 374). F. A., a British subject, died domiciled, *jure gentium*, in France. She had made a will, in France, in English form: the will dealt with movables all of which, save the contents of her lodgings, were in England. The testatrix had not obtained from the French government authorisation to acquire a French domicil. The judge of the Prerogative Court (Sir John Dodson) admitted the will to probate on the ground that, though F. A. had her domicil *de facto* in France, yet that it was necessary, in order to establish a domicil in France such as would affect her succession and the mode of making her will, that her domicil should be by authorisation of the French government. The judge expressly said that he was following *Collier* v. *Rivaz* (p. 256): " It is the duty of the Court," said he, " to follow in the same

" course." This decision was reversed in the Privy Council, the judgment of that tribunal being rendered by Lord Wensleydale. " Two questions," said he, " were before the Court, " the first relating to Domicil, and the second was, Has it " been established that *by the municipal law of the Domicil* at " time of death the will propounded was valid?" As to the first of these questions it was held that F. A., the testatrix, was domiciled in France *jure gentium* despite the absence of governmental authorisation: the second question accordingly resolved itself into this, whether in the case of a person so domiciled the use of English forms was " sanctioned by the municipal law of France" (10 Moo. P. C., p. 361).

The key-stone of Lord Wensleydale's judgment is that, F. A. dying domiciled in France, the validity of her will is to be determined by French law. Subject to that dominating consideration, the judgment deals with two alternative interpretations—(a) and (b) below—of Art. 13 of the Code Napoléon. That Art. ran, " L'étranger qui aura été admis " par l'autorisation de l'empereur à établir son domicile en " France, y jouira de tous les droits civils, tant qu'il continuera " d'y résider."

(a) Let us interpret this Art. to mean that French law refuses civil rights, including the right of testation, to one who is " domiciled but has not an authorisation " (p. 365). Two cases must be considered, says the court:—(i) Suppose that this refusal applies to goods wherever situate. In this case F. A. loses, by the (French) law of her domicil, power to make a will altogether: and the will propounded is invalid (p. 365). (ii) Suppose this refusal applies only to goods situate in France. " Still the will, to have any effect, must " be *in the form and with the solemnities of the domicil*, " according to the general rule,[1] otherwise it cannot be " admitted to proof" (p. 366).

[1] This "general rule" is "the rule of International law . . . that the form and solemnities must be governed by the law of the domicil of the deceased;" the opposed rule, *i.e.*, *locus regit actum*, which some of the experts stated to be the rule of International law adopted in France, was summarily banished by the court. *See* pp. 362–3. In an English forum only the English rules of International law can be entertained.

(b) Does Art. 13 mean that French law insists that (p. 366) "no domicil *for any purpose whatever* can be ob- "tained without authorisation"? After considering French cases and the opinions of French writers, Lord Wensleydale says (p. 373) "On the whole, then, on a review of all this "evidence of the law of France, their lordships are clearly "of opinion that it is not established that, for the purpose of "having *a domicil which would regulate the succession*, any "authorisation of the Emperor was necessary . . . . . and "that consequently, if the testatrix had a power to make a "will at all, the will in this form was invalid."[1]

It will be seen that this case stops short just where it begins to be interesting. Had the court come to the conclusion that French law had no rules of succession (testate or intestate) for a foreigner who was domiciled in France without authorisation, the court would have had to say how it would deal with the lacuna. That it would not have applied French rules *malgré* French law seems a logical conclusion, for, otherwise, the long discussion as to the effect in France of the absence of authorisation would have been unnecessary.

(5) *Crookenden* v. *Fuller* (1859, 1 Sw. & T., p. 441). The suit related to a will made in English form. *Held*, that the testatrix was domiciled in England at death, and that the will was therefore valid. It had also been pleaded that, even if the testatrix's domicil at death were French, the will was valid in point of form by French law. An uncontradicted opinion by a French advocate was given in evidence to the effect that the rule of French law which allows a Frenchman to make a will out of France in accordance with the formalities of the *lex actus*, would by French law apply also in favour of an English subject domiciled in France. The

[1] It had been insisted in argument that *Collier* v. *Rivas* was wrong in law: the judgment does not touch upon this question, the court simply saying that it doubts whether the judge in *Collier* v. *Rivaz* was warranted by the evidence in coming to the conclusion which he did. The law of *Collier* v. *Rivas* is neither adversely nor favourably affected by *Bremer* v. *Freeman*. See 4 Phillimore, *Int. Law*, § cccxlvii, for the subsequent history of the latter case.

court accepted this and found for the will on this point also; but the finding on the first point really settled the matter.

(6) *Laneuville* v. *Anderson* (1860, 2 Sw. & T., at pp. 38, 39). The Court of Probate (Sir C. Cresswell) declared a will to have been initially valid, *quoad* form, in the following circumstances. The testator, a British subject, who was domiciled *de facto* in France but had not obtained authorisation from the French government to establish his domicil in France (*see* 9 Moo. P. C., p. 330), made in England a will in English form. "The evidence proves," said the court "that the will was valid by the law of France." The "law" in question was (2 Sw. & T., p. 29) Art. 999 of the Code Civil: "Un Français qui se trouvera en pays étranger pourra "faire ses dispositions testamentaires . . . par acte authentique "avec les formes usités dans le lieu où cet acte sera passé." A French court by declaring this will to have been subsequently *revoked* showed that it construed this Art. as applicable to Frenchmen by domicil as well as to Frenchmen by nationality.[1]

(7) *In the goods of Luigi Bianchi* (1862, 3 Sw. and T., p. 16). Luigi Bianchi, Genoese by birth, whose domicil of origin was in the (then) kingdom of Sardinia, went to Bahia in the empire of Brazil and acquired a considerable fortune. In 1856, having wound up his affairs at Bahia, he sailed for Genoa where he intended to reside permanently. He died on the voyage, intestate. Some of his children were in Genoa, others in Brazil. He possessed movables in England; and in 1859 the Court of Probate granted administration to

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[1] In *Onslow and Allardice* v. *Cannon* (1861, 2 Sw. & T., p. 137), we see how settled the doctrine had become, that Renvoi was permissible in ascertaining the adequacy of testamentary formalities. In that case the next of kin of Cannon, deceased, opposed a will executed by him in 1859 in the Mysore territory in the, locally valid, English form. The ground taken was that the testator was a domiciled Scotsman and that the execution was invalid by the law of Scotland. Pending the suit, a Court of Appeal in Scotland, in *Purvis's Trustees*, determined that the will of a domiciled Scotsman was good as to personalty if executed according to the *lex loci actus*. The next of kin of Cannon, accordingly, withdrew their opposition. Dr. Deane, Q.C., of counsel for the next of kin, said, "Thus, if in the present case we had established a Scotch domicil, it would not have "invalidated the will, being executed in accordance with the law of the place where it was "actually made."

the representative of a person who had been appointed guardian by the Brazilian law. Discussions, however, took place between the Governments of Sardinia and Brazil with respect to the domicil of Bianchi at the time of his death, which ended in an agreement being come to between the two Governments by which the Brazilian Goverment gave up to the Sardinian all claim to administration and guardianship. In 1862, accordingly, an application was made to the English court to rescind the former grant of administration, and to make one in favour of the Sardinian Consul at Bahia. The court (Sir C. Cresswell) said, "What is the arrangement "between the Courts of Turin and Brazil? *If the deceased* "*was domiciled in Brazil at the time of his death, how can* "*such an arrangement affect the grant to be made by me?*" Ultimately, however, Sir C. Cresswell granted the application. He was pressed with the argument, "The Brazilian Govern- "ment have surrendered all their interest in the matter to "the Italian Government": but he took no notice of it. His decision was given on the ground that, as Bianchi had finally abandoned his acquired domicil in Brazil, his Sardinian domicil of origin revived.

(8) *In the goods of Lacroix* (1877, 2 P. D., p. 96). A British subject, presumably domiciled in France, made a will in France in the form required by the Wills Act, 1837, and not in any of the forms allowed by internal French law. This will would be valid in England, under Lord Kingsdown's Act, if "made according to the forms required by the law of the place where the same was made." It was proved by affidavit that by French law the will of a British subject made in France would be valid if it were in accordance with the forms "required by the law of England to give validity to "wills executed by Englishmen in England." Probate was therefore granted by Sir J. Hannen: *i. e.*, the phrase in Lord Kingsdown's Act, "Law of the place where the same was made" was interpreted to mean "the territorial law "which the *lex actus* would deem applicable in the given "case."

Note.—(i) The court was moved *ex parte* and was, probably, desirous of giving effect to the will. No attempt was made to reconcile the decision either with the words of Lord Kingsdown's Act or (which would have been much more difficult) with the juridic reasons for the rule *locus regit actum.* (ii) The law of England concerning the wills "of Englishmen" was identified by the court with the territorial law of England, *i. e.*, the Wills Act: now a French court applying LNat. might well be justified in giving this liberal interpretation to the phrase, but that it is inadmissible in an English court is shown in the note to Case No. 10 below.

(9) *In re Trufort* (1887, 36 Ch. D., p. 600). A Swiss subject died domiciled in France. X claimed in the Swiss court to be recognised as his legitimate son and to be entitled as such to nine-tenths of his estate, and obtained a final judgment in his favour on both points. The deceased had left a will by which he gave his fortune to Y; part of this fortune was movables in England. Mr. Justice Stirling declared that he was bound by the decision of the Swiss courts: "Where," said he, "the title has been adjudicated on by the Courts of the "domicil such adjudication is binding on the Courts of Eng-"land": true, the domicile was France, but French law (according to the evidence adduced) regulates movable succession by reference to LNat., and, in addition, by a treaty made between France and Switzerland in 1869, the rights of persons claiming to share in the estate of a Swiss subject dying domiciled in France were to be determined according to the law and by the tribunals of Switzerland. Said Stirling, J.: "The claim of the parties litigating in this Court has been "actually raised and *decided in the Courts which, according* "*to the law of the deceased's domicil, were the proper and* "*competent Courts* to decide. I am bound by the decision."

Note.—It was not so much as suggested that the material law applicable was the internal French law.

(10) *Abd-ul-Messih* v. *Farra* (1888, 13 A. C., p. 431). This action related to the movable succession of a person, a member of the Chaldean Catholic community, whose domicil

of origin was Turkish, but who, from 1858 until his death in 1885, was resident in Cairo where he had acquired the status of a protected British subject. The Supreme Consular Court of Constantinople, applying an Order in Council whereby its civil jurisdiction was, as far as circumstances admit, to be exercised on the principles of the law for the time being in force in and for England, put itself in the same position as an English Court of Probate as regards the succession in question, and applied the law of the domicil of the deceased: this domicil was held to be Turkish, inasmuch as, Cairo not being British soil, it was impossible for the deceased to have acquired an English domicil by residence there. The Privy Council approved of this decision. So far no question of Renvoi arises.[1] But in the course of the judgment of the Privy Council (which was delivered by Lord Watson) an indication was given of the way in which the case would have been treated had it been a case of Renvoi. On p. 443, Lord Watson deals with the suggestions (i) that it was for the Ottoman law to say whether, in the circumstances, the deceased had, or had not, lost his Turkish nationality and become a British subject, and (ii) that, if it should make a declaration that there had been this alteration, then, a Turkish tribunal would, in administering the estate, defer to the law of England as LNat. In other words, Lord Watson deals with the supposititious case: Eng. LFor. → Turk. LDom. → Eng. LNat., and he says (p. 444):

"If it be assumed that, in consequence of his having placed himself under foreign protection, the Porte resigned the deceased, *both civilly and politically*, to the law of the protecting power, that would merely give him the

[1] The case simply shows that "English law" as administered in Consular courts includes English rules of I.P.L. The same point arose and was similarly decided in *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (1901, A. C., p. 373). The British Crown has a sovereign power and jurisdiction in Zanzibar by virtue of "treaty, "grant, usage, sufferance and other lawful means," but Zanzibar remains none the less foreign territory, the British King and his officers acting *ad hoc* as Zanzibar officials. This authority the British Sovereign orders to be exercised in accordance partly with certain Anglo-Indian laws and partly with English law. In the case under consideration the latter law was applicable. It was a case relating to local land. "The law of England," said the Privy Council (p. 383), "recognises the principle that the incidents of land are governed by the "law of its site. Therefore . . . . H. M. would exercise Zanzibar jurisdiction on the "principle that Zanzibar law, which is Mahomedan law, applies to this case."

same rights as if his nationality had been English, and *the territorial law of his domicil would still be applicable* to his capacity to make a will and to the distribution of his estate."

Note.—The italicised part of the following passage is of importance in connection with the subject-matter of Note (ii) to case No. 8 above (*Lacroix*).

"According to sect. 6 (of the Order in Council) they (the Consular Courts) are to administer the law for the time being in force 'in and for England,' an expression which simply denotes the law for the time being administered in the Courts of England; and, according to sect. 91, they are to have the same jurisdiction in probate as belongs to the English Court of Probate. If this suit had been brought in the Court of Probate here, there can be no doubt that the law applicable would have been that of the testator's domicil; but it was suggested for the appellant that the words 'in and for England,' must be read as if they had been 'in England and for Englishmen.' That construction would not avail her, because *testate succession of an Englishman is regulated by his domicil*, which may be in France or elsewhere abroad. In order to support the argument, it would be necessary to make the gloss run thus, 'in England and for Englishmen domiciled there.'"

(11) *In the goods of Brown-Séquard* (1894, 70 L. T., N. S., p. 811). Two British subjects intermarried in France; a marriage settlement gave the wife a power of appointment by will of certain trust-funds in England. After the marriage the parties obtained, and retained until their death, a French domicil; the husband became also a naturalised French subject, but by French law this did not affect the political status of the wife. While on a temporary visit to England, the wife executed in English form, but not in accordance with the requirements of internal French law, a will exercising the power of appointment conferred on her by the marriage settlement. An *ex parte* application was subsequently made to Jeune, P., to admit the will to probate. The judgment was as follows:—

"The testatrix being at the time of her death, according to English law, a domiciled subject of France, I must look at French law and see what it says on the point. I find from the affidavit of a French advocate that, according to the law of France, this will is operative"—inasmuch as the deceased was, by French law, an Englishwoman—"I therefore admit it to probate."

(12)[1] In the case now to be mentioned, *In re Johnson* (1903, 1 Ch., p. 821), the word "renvoi" seems for the first time to have been heard in an English court. In 1894 a British subject, whose domicil of origin was Malta, died, intestate.[2] Domiciled in Baden (p. 826 of judgment), she was not naturalised there, and the evidence was that by the law of Baden her succession was governed solely by the law of the country of which she was a subject at the time of her death. She left movables in Baden and in England. The court (Farwell, J.) directed the movables under its jurisdiction to be distributed amongst the persons entitled thereto according to Maltese law. The reasons for this decision were stated in the alternative: (i) A domicil of choice which is, according to the law of the country chosen, ineffectual as regards the post-mortuary distribution of movables, was held to be, for this purpose, no domicil at all (p. 828). The deceased, therefore, retained her domicil of origin, in Malta, until her death, and the law of that domicil applied to her succession. (ii) Assuming,[3] however, that the deceased was domiciled in Baden, and that the law of Baden had seisin of her succession, still it would apply LNat., *i. e.*, the law of the British nationality—*i. e.*, in this case the

[1] In *In re Martin* (1900, P. D., p. 211), Jeune, P., made a pronouncement which, despite the high authority of the learned Judge, is here referred to in a footnote only, because it was not only *obiter* but also not finally considered. He had decided that a person was domiciled, in the English sense of the word, in France: he then adverted to the possibility that the French law might hold that person to be domiciled, in the French sense of the word, in England. Of the questions which would then arise he said, "I am very far "indeed from saying that I have arrived at a clear view . . . . I confess it is extremely "likely (I go no further) that, in that case, we should again have had to apply English law, "though I am not insensible to the difficulty counsel has pointed out as to what he termed "'an infinite series.'" (See para. 20, *post*). The President then went on to declare that if and when he had arrived at the conclusion that, in a matter governed by LDom., the domicil was French, he would have to imagine himself "*placed in the position of a French Judge.*" This *dictum*, which does not lack support, is a crucial one, for if it be admitted without qualification, Renvoi is admitted, and admitted in what will be hereafter shown to be its more unscientific form. See p. 105, *post*.

[2] More correctly, "partly testate and partly intestate," for her will did not cover all her property; the report does not say what formalities were adopted by the deceased in making it.

[3] The actual language of the learned judge in introducing this alternative line of reasoning was "even if the Baden Courts would not have refused jurisdiction" (p. 832). The phrase is difficult to construe, but principles of logical dichotomy compel the belief that his meaning was as given above.

law of Malta.[1] In the latter of these two alternative reasons the court accepts the Renvoi principle, in what will hereinafter be shown to be its more objectionable form.[2] It may be as well to point out here that no one was interested to contend for the application of municipal Baden law.

7. If, as the writer believes to be the fact, the list given above comprises all the English[3] cases which bear directly on the Renvoi-question, it will be seen that, up to the end of the 19th century, English tribunals had pronounced on the *Weiterverweisung* question in contradictory manners (No. 8, *Bianchi*; No. 9, *Trufort*) and, for the rest, had shown a willingness to render a will formally valid by interpreting English rules of I.P.L. in a sense consistent with that required by the Renvoi-theory. In order, however, justly to estimate the value of these cases it would be necessary to take into account also the rest of the mass of English case-law on I.P.L. Only by so doing can we say whether the cases in question are to be treated as exceptional and subordinate, on the one hand, or as authenticating, on the other hand, a

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[1] The judge arrived at this undoubtedly correct determination of the deceased's LNat. in the following way. Politically foreign countries desiring to ascertain LNat. of a British subject must do so by inquiring of England, "the country with which alone they are in diplomatic relation" (p. 835); and "inasmuch as the law of England distributes such movables in accordance with domicil of origin," LNat. in this case is the law of Malta. What the authority for the doctrine in the passage last quoted is, the writer cannot conjecture. It is submitted that the court of Baden would have arrived at the same result more simply, by saying that LNat. in the case of a British subject is the law of that legal area within the British Empire where the person in question last had a domicil. This is what it would have done had it desired to ascertain the nationality, *quoad* the personal statute, of a German subject. The learned judge asks (p. 834), "What nationality at his death can a Court which ignores domicil attribute to a man born in Scotland who makes his home and fortune at the Cape and dies in England?" Answer: His LNat. is the law of that one of the three legal areas where the Court would say, if it did not ignore domicil, that he last was domiciled. There would be no need to petition Mr. Choate to ask Mr. Secretary Hay what is LNat. of a citizen of the United States domiciled in New York. To determine LNat. in the case of a British subject by reference to domicil of origin, to the exclusion of a British domicil of choice, is to deny him within the Empire that power of changing his nationality which he enjoys outside it. "Domiciled Scotsman" is a correct phrase and free from the ambiguity attaching to the phrase "domiciled Frenchman."

[2] But what if the law of Malta refers the question back again to LDom. which *ex hypothesi* is Baden! *In re Johnson* is considered *post*, pp. 115, *et seq.*

[3] See in the Appendix hereto the case of *Ross* v. *Ross*, where the Canadian courts upheld a will as valid, in point of form, by means of Renvoi. In 1873 the New York Court of Appeal acted in the same manner in the case of *Dupuy* v. *Wurtz* (Clunet, 1874, p. 86; 53 N. Y., p. 556). See Appendix hereto.

doctrine of general application. It may be that the practice of a hundred years has so firmly based the fabric of English international jurisprudence upon principles other than, possibly also less scientific than, those to which Renvoi-adherents appeal, that the cases in question lose their seeming importance when viewed in true perspective. The consideration of this matter is attempted towards the close of this pamphlet. Meanwhile it is here important to show what use, in this connexion, has been made of the cases given above, by English writers on I.P.L. Mr. Westlake, in the third edition (1890) of his Treatise, has the following passages :—

(*a*) "Section 89 . . . the law of any foreign country by which a will may be sustained includes private international law as received in that country, so that if a will would there be held valid because executed according to the forms of any other law, as, for example, that of the *locus actus* or of the testator's political nationality, an execution according to those forms will be one according to the law of the domicil, though not in accordance with the forms of the domicil."

He relies on the cases mentioned 1, 5, 6 and 8 above.

(*b*) "Section 254. If an establishment be made in any country in such manner that by English law it would fix the domicil there, still no effect which the law of that country does not allow to it can be allowed to it in the character of domicil in England. In other words, no one can acquire a personal law in the teeth of that law itself."

He relies in this section on Nos. 1 and 4 above; also on *Hamilton* v. *Dallas*.[1] Of *Bremer* v. *Freeman*, he says :

[1] *Hamilton* v. *Dallas* (1875, 1 Ch. D., p. 257). The question in this case was whether the movable succession of an intestate (Lord Howden) was to be governed by the English Statutes of Distribution or by the corresponding rules of French law. Although the deceased had been resident in France for many years before his death, he had not obtained, under Art. 13 Cod. Civ., the authorisation of the French Government to establish a domicil in France, and it was argued that the *animus* with which he took up his residence in France, though coupled with the *factum* of long-continued residence, was, by reason of the absence of authorisation, not enough to make his domicil French for the purposes of succession. The Court (Bacon, V.-C.) pronounced very definitely against this argument, saying: "It is mere "commonplace . . . . that upon a question of domicil the test must always be the *animus* "and the *factum* (p. 268) . . . . If it was competent for Lord Howden (as, in my opinion, "it was abundantly competent for him) . . . . to take up a domicil in a foreign country, "he had *de facto cum animo* done that beyond all possibility of doubt . . . . Then it was "suggested that by the French law it was not competent for Lord Howden to acquire a "domicil . . . . That a foreigner can acquire a domicil *de facto* in France is not for a "moment to be called in question. It requires no provision in the Code for that; it is a "law paramount to the law of the Code" (p. 270). The Vice-Chancellor further expressed

"It was held (in the Court of first instance) that according to English principles on domicil a testator had acquired a domicil in a foreign country, and that the effect of applying English principles on wills to that state of his domicil would have been to invalidate his will, contrary to the law of that country, which the Court refused to do. *Bremer* v. *Freeman* was reversed on appeal, it being held that to invalidate the will was not contrary to the law of France, in which country the testator, without authority from the French government, had acquired a domicil according to English principles."

Mr. Dicey, in his *Conflict of Laws*, refers to the question in two places. The passage (*c*), set out below, relates to the interpretation to be placed on terms used by him in his book, but it may be taken to be his doctrine on the general question.

(*c*), p. 77.—"When any Rule, applied to the circumstances of a given case, designates a foreign country, *e.g.*, Italy, as the country the law whereof is to determine the case, or, in other words, directs that the case be determined in accordance with the law of Italy, then the term 'law of Italy' means, unless the contrary is expressly stated, any principle or body of law which the Italian Courts hold applicable to the particular case. The Rule, in effect, directs that English Courts shall decide the case with reference to the law, whatever it be, according to which the Italian Courts would decide it."

He relies on case No. 1 above, and mentions case No. 8 and *Pechell* v. *Hilderley*.[1]

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the opinion that the 13th Art. of the Civil Code did not bear the construction that, under it, absence of governmental authorisation would prevent the obtaining of a domicil *de facto* in France (p. 270). There is, however, nothing in the judgment to suggest that, had Art. 13, in the judge's opinion, prevented an unauthorised domicil from being treated in France as domicil, this would have affected an English court; on the contrary, there is much to lead the inference that French doctrine on the subject is immaterial *jure gentium*. This case is a strong one, inasmuch as the decision in favour of a French domicil deprived the English revenue authorities of legacy duty.

[1] *Pechell* v. *Hilderley* (1869, L. R., 1 P. and D., p. 673). Capt. P., a British subject and (presumably) domiciled in England, left a will and two codicils. The will was made in India and was not in the form required by the Wills Act: the codicils were executed in Florence. The first codicil was not valid in point of form either by English or by Italian law; the second was in the form required by Italian law, but evidence was given that, being only a codicil to a will, it would not be upheld by Italian law as an independent paper and would fail if the will failed. It was argued that by regarding the validity of these papers partly according to Italian and partly according to English law, a valid will and codicils would result. Without saying whether this effect would be produced, the court declined to apply two systems of law at the same time. "I am of opinion," said Lord Penzance, "that "in determining the question whether any paper is testamentary, regard can be had to the "law of one country only at a time, and that the mixing up of the legal precepts of two "different countries can only result in conclusions conformable to neither."

The second passage in which Mr. Dicey deals with the Renvoi-question is the following:

(*d*), p. 113.—"The acquisition of a domicil cannot be affected by rules of foreign law. But the legal effect to be given to the domicil acquired will depend upon the law of the country where the person in question is domiciled. Thus if D dies domiciled in France, though without having obtained the authorisation required by the Code Napoléon, Art. 13, the descent of his movable property in case of intestacy, or the validity of his will of movables in case he leaves a will, will be determined by the rules which French Courts would apply to the case of a person who, though resident in France, has not obtained the necessary authorisation."

He refers to cases 1 and 4 above, and to *Hamilton* v. *Dallas*.

Both Mr. Westlake and Mr. Dicey hint that the conditions which have given rise to the Renvoi-question exist in English law in a wider area than that of testamentary Formalities: the former, in extract (*b*), suggests that this is so with regard to the Personal statute, and the latter suggests that it is so with regard to I.P.L. in general. Neither of these distinguished writers, however, refers to the ulterior difficulties which his doctrine engenders, and neither, of course, offers any solution of them, *i. e.*, of the Renvoi-question.[1] The present writer returns to this topic towards the end of this pamphlet.

[1] Mr. Foote, in the 3rd edition of his *Private International Jurisprudence*, published in 1904, abstains from any discussion of the question. See pp. 10, 268. Mr. Nelson, *Selected Cases*, p. 187, relying on the cases above mentioned relating to testamentary Form, and on *Hamilton* v. *Dallas*, says of I.P.L. in general that the "law of the domicil" means "the law that the Court of the domicil would apply to a case before it."

III.

8. The first occasion on which the Renvoi-question came before a continental tribunal seems to have been in 1856, when the Court of Guelderland (Holland) declined a Renvoi from Prussian law, as *lex actus*, to its own law, as *lex loci situs*, in a matter of donation (*Revue de Droit Internat.*, Vol. ~~XXX~~ XIII, p. 410). The next case was that before the Lübeck Court in 1861, referred to herein on p. 50. Thenceforward the question slept until 1876, the year when the Forgo case[1] came, for the second time, before the French Cour de Cassation. The following (imperfect) summary—wherein the legal category to which the case belongs and the result (*Pro* or *Contra* the Renvoi-theory) are indicated—will give some idea of the extent to which foreign judges have been concerned with the question since the date of the Forgo case.

I. FRANCE :—

1888.	Marriage Settlement. *Pro* (*obiter*). (Clun., 1888, p. 814.)
„	*Interdiction. *Pro.* (Clun., 1888, p. 791.)
1889.	*Legitimation by subsequent marriage. *Pro.* (Clun., 1889, p. 638.)
1891.	Form of donation. *Pro* (*obiter*). (Clun., 1891, p. 238.)
1893.	*Capacity of married woman. *Contra.* (Clun., 1893, p. 530.)
1894.	*Interdiction. *Pro.* (Clun., 1894, p. 531.)
„	*Filiation. *Pro* (*obiter*). (Clun., 1894, p. 1007.)
1895.	*Capacity of married woman. *Pro* (*obiter*). (Clun., 1895, p. 105.)

[1] See Sewell, *French Law affecting British Subjects*, p. 46, *et seq.*, and p. 169, *et seq.* The case related to the succession to François Xavier Forgo, a natural child, a Bavarian by birth who obtained a domicil *de facto* at Pau, and died there intestate. Certain relatives of the deceased who would have been entitled under Bavarian law, but not under French law, to succeed to his estate, claimed against the French revenue authorities who had obtained possession. It was held that the succession ought to be governed by Bavarian LNat., but that as Bavarian law referred the succession to the French law, (i) in regard of the "statut personnel" as being the LDom., and (ii) in regard of the "statut réel" as *lex situs*, the French law was alone applicable.

* An asterisk denotes that the Renvoi was from the English or American law.

I. FRANCE—*continued.*

1896.	*Administration.	*Contra.*	(Clun., 1897, p. 165.)†
1899.	*Divorce.	*Contra.*	(Clun., 1899, p. 360.)
„	Interdiction.	*Pro* (*semble*).	(Clun., 1899, p. 794.)
„	Patronymic.	*Pro.*	(Clun., 1899, p. 569.)
„	*Succession.	*Pro.*	(Clun., 1899, p. 825.)
„	* „	„	(Clun., 1900, p. 368.)
1901.	* „	„	(Clun., 1902, p. 858.)

II. BELGIUM :—

1879.	*Succession.	*Pro.*	(*Rev. de Dr. Int.*, Vol. XVI, p. 142.) ✓
1881.	*Divorce.	*Pro.*	(Sirey, 1881, 14, 41.)
1887.	*Succession.	*Pro.*	(Clun., 1887, p. 748.)
1896.	Divorce.	*Pro.*	(Clun., 1896, p. 895.)
„	*Succession.	*Pro.*	(Clun., 1896, p. 655.)

III. § GERMANY :—

1861.	Succession.	*Pro.*	(Seuff. *Archiv.*, xiv, No. 107.)
1880.	„	„	(*Bad. Annal.*, xlvii, p. 145.)
1881.	„	„	(*Ibid.*)
1885.	„	„	(*Bad. Annal.*, li, p. 373.)
„	„	„	(*Ibid.*)
1886.	Parent and child.	*Pro.*	(Bolze, *Praxis*, III, No. 28.)
1888.	Succession.	„	(*Entsch. d. RG., civil.*, xx, p. 351.)
1889.	Guardianship.	*Contra.*	(*Bad. Annal.*, lv, p. 129.)
„	„	„	(*Entsch. d. RG., civil.*, xxiv, p. 326.)
1890.	Succession.	„	(*Bad. Annal.*, lvii, p. 14.)
1892.	„	*Pro.*	(Böhm's *Zeitschr.*, ii, p. 469.)
„	„	*Contra.*	(*Ibid.*, iii, p. 416.)
„	„	„	(*Ibid.*, p. 520.)
1893.	Contract.	„	(*Ibid.*, iv, p. 151.)
1894.	Succession.	„	(*Bad. Annal.*, lx, p. 213.)
„	„	„	(*Zeitschr.*, v, p. 58.)
1896.	„	*Pro* ?	(*Entsch. d. RG., civil.*, xxxvi, p. 205.)
1897.	„	*Contra.*	(*Zeitschr.*, ix, p. 134.)
1898.	„	„	(*Ibid.*)

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* An asterisk denotes that the Renvoi was from the English or American law.

§ For the German cases the writer is indebted to the courtesy of Dr. Franz Kahn, of Heidelberg. The bracket means "same case.'

† See Sewell, *French Law, etc.*, p. 75.

III. GERMANY—*continued.*

1898. Effect of marriage on property. *Pro.* (*Ibid.*, ix, p. 112.)
„ Effect of divorce on property. *Contra.* (*Ibid.*, p. 116.)
„ Succession and marriage settlement. *Contra.* (*Ibid.*, p. 311.)

IV. SWITZERLAND :—

1894. *Capacity of married woman. *Contra.* (Clun., 1894, p. 1095.)

V. SPAIN :—

*Succession. *Pro.* (Clun., 1901, p. 905.)

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* An asterisk denotes that the Renvoi was from the English or American law.

IV.

9. The Renvoi-question received a certain amount of scientific consideration from the judges who decided the cases referred to in the preceding paragraphs; but, as might be expected, it is in monographs issuing from the study and not in judgments rendered, that the matter has been subjected to the most exhaustive analysis. It might also be expected, and it is the fact, that the abstract treatment of the question is to be found in Continental rather than in English literature: indeed, Mr. Westlake's contributions to the proceedings of the Institute in 1898 and in 1900, and a few lines in Mr. Sewell's *French Law affecting British Subjects*, seem to be the only public utterances of English science upon the subject, prior to 1903, the date of *In re Johnson* (p. 19, *ante*).

It is proposed to indicate below, by quotations and summaries, a few of the main lines of argument employed on either side: theoretical considerations of this kind assume practical importance if it be admitted that English law has not, as yet, made its final and definite pronouncement.

Juristic speculation on the Renvoi-question has been stimulated by three facts: 1st, beginning with the Forgo case (which was before the French courts between 1874 and 1882), the question has repeatedly pressed itself upon the attention of foreign tribunals,—especially the French, Belgian and German,—during the last twenty years; 2nd, the elaboration of the new German Code and of its ancillary statutes evoked much discussion of the fundamental principles upon which the solution of the Renvoi-question depends (see p. 72, *post*); 3rd, the Institute of International Law formally deliberated upon the question in the closing years of the 19th century and came to a resolution thereon at the Session of 1900 (see p. 71, *post*).

10. Historically, beyond doubt, the Renvoi-theory is a modern development, and, as such, it must justify itself. We begin, therefore, with some of the arguments of its champions.

It is sometimes alleged (*teste*, Buzzati, *Rinvio*, § 8) that by means of Renvoi identical decisions of the same case can, everywhere, be obtained. Thus, suppose the question concerns the testamentary capacity of a Dane, aged 19, domiciled in Italy. According to the Italian Code testamentary capacity begins at 18 and, according to the Danish law, at 21. In Italy the capacity of a person is regulated by LNat. (Cod. Civ., Art. 6), in Denmark by LDom. Apart from Renvoi, the Italian judge will deny testamentary capacity to the person in question, and the Danish judge will declare him capable. But, it is said, let the Italian judge interpret Art. 6 as a rule allowing Renvoi and we have: Ital LFor. → Denm. LNat. → Ital. LDom., and the person is, in Italy, declared capable just as he would be by the Danish judge.

The weakness of this argument is obvious. If the Italian judge deems his rule concerning the capacity of a non-Italian (*quoad* nationality) to be a Renvoi-rule, how is he justified in deeming the Danish rule concerning the capacity of a non-Dane (*quoad* domicil) to be other than a Renvoi-rule? And, if the Danish rule were treated as a Renvoi-rule and the case came before a Danish court, we should have: Dan. LFor. → Ital. LDom. → Dan. LNat., and testamentary capacity would be denied. "Hence," says Buzzati (*Rinvio*, p. 70), "Not uniformity of decisions, but as before discord: with "this fine result added—that the Italian judge in virtue of "his conflict-rule which gives the preference to LNat. will "judge of capacity according to LDom., and the Danish "judge in virtue of his conflict-rule which adopts the criterion "of domicile will judge in accordance with LNat. Precisely "the opposite of what each conflict-rule enounces!"

Obs. 1.—If, however, this argument in favour of Renvoi breaks down when identity of judgments is claimed as a

general consequence of the acceptance of the Renvoi-theory, it is submitted that, when limited to *certain cases*, the argument holds good. Let us take the crucial case which (as we shall shortly see) von Bar uses with such effect in another connexion: *i. e.*, let us suppose that the English courts to-day have before them a question involving the marriage-capacity of an Austrian lady who married in France, say twenty years ago, being then domiciled in France. Both the Austrian law and the French law would determine the question by reference to the Austrian law as LNat.; if the English court, adopting LDom., adopts it in the sense of Renvoi, it will also apply the Austrian law, and in this way (and in this way only) a uniformity of decision is undeniably obtained. Buzzati attempts to belittle this result by varying the facts as follows: "Let us" (says he) "suppose that the marriage "took place in country B instead of in France and that both "the law of England and the law of B regulate marriage-"capacity by reference to the law of the place of celebration, "*i. e.*, the law of B." In this case it is clearly impossible by means of Renvoi to secure that the English courts will give the same decision as the French and Austrian courts, but the criticism suggested by Buzzati's variation of the facts is only pertinent as against those (if there be any) who allege that the Renvoi-theory can eliminate all possibility of divergent decisions.

Obs. 2.—Kindred to the advantage claimed above for the Renvoi-theory is that which was, somewhat naïvely, claimed for it by M. Alberic Rolin at the discussions of the Institute in 1898 (*Annuaire*, 1898, p. 215). It has produced, said he, excellent results in Belgium. Thanks to it, English subjects domiciled in Belgium are submitted to the law of Belgium in matters of Divorce, and thus, in effect, they live, as English people would expect to live, under their LDom.—and the public order of Belgium does not suffer thereby, for it is better that there should be one uniform law for all families throughout the same country. The competence attributed by the Belgian law to LNat. in matters of Divorce

rests, continued M. Rolin, on the assumption that the LNat. is the law most interested, and not on the assumption that it knows what is best in the circumstances: hence, when, as in the case of English people domiciled in Belgium, it is impossible to admit that their LNat. is the law most interested, the Belgian courts do right in accepting the Renvoi.

The Renvoi-theory is here praised for procuring a uniformity of decision: but, in truth, it is really used to obviate the ill-effects of the selection, on the part of the Belgian law, of LNat. instead of LDom. to regulate international questions of Divorce.

11. Another argument *pro* the Renvoi-theory is connected with the extra-territorial effect of judgments. (See, *e.g.*, M. Weiss, *Annuaire*, 1900, p. 151.) In a case: LA → LB → LC, if LA does not apply LC, the judgment will not obtain *exequatur* in B. M. Bartin, professor of law at Lyons, considers this argument in Vol. XXX, *Revue de Dr. Internat.* (1900), p. 129. After pointing out that its force may depend in part upon the question whether the B judge in granting *exequatur* examines the original judgment *au fond*, or whether he merely satisfies himself that its issue is regular, he attacks the argument on the following lines. (a) If a French court is dealing with the capacity of (say) a Dane domiciled in France, it is alleged that in order to be sure of obtaining *exequatur* in Denmark he must pay heed to the Danish rule of conflict: thus—Fr. LFor → Denm. LNat → Fr. LDom. But invert the case and suppose that the same question arises in a Danish court: in order to be sure that the French courts will recognise the Danish judgment, we must have: Denm. LFor. → Fr. LDom. → Denm. LNat. Each judge, *i.e.*, is to apply the system which is repudiated by his own law: we turn in a circle. (b) But even if in: LA → LB → LC, LA applies LC in order to be sure of obtaining *exequatur* for his judgment in B, what about *exequatur* in D, E, and F? The argument is only of value if it were possible to determine a country of principal execution; but this is only possible in

the case of immovables, a case where the question could hardly arise, *locus situs* being the *locus fori;* matters of capacity and of patrimony (including succession, tutelage, bankruptcy) may, on the other hand, concern jurisdictions D, E, and F, just as much as they concern jurisdiction B. Why then adopt, on this ground, the conflict-rule of B and accept the Renvoi from LB to LC? (c) Further, the question whether LB will grant *exequatur* to a judgment rendered in A depends not on a single consideration but on a variety of considerations, including that of the competence of A, both in the special case *ratione materiæ* or *ratione personæ*, and also generally in that kind of case. If then A desires to give a judgment which will certainly receive *exequatur* in B, he must adopt not only (i) B's solutions as to the conflict of laws, but also (ii) B's doctrines as to general competence (even going so far as to declare himself competent because LB says so, when his own law would say he was not competent). If with this object he is prepared to renounce his own rules in the former matter (*i. e.*, to accept the Renvoi), he must be prepared to do so in the latter matter, a position never admitted in practice.

Obs.—Let us apply argument (c) to England. The English courts are concerned with (say) the essential validity of a marriage celebrated in France between two English people, domiciled in France both now and at the time of the marriage. The English rule of I.P.L. would ordinarily determine the matter by reference to the French law, but (we suppose) it admits a new principle, to the effect that the necessity of obtaining recognition of its judgments in France is so urgent as to justify a transformation of its rules of I.P.L. into Renvoi-rules: the English court accordingly applies to this case its own local rules of capacity, etc., by Renvoi from French law. If, however, this surrender is not too high a price to pay for the recognition in question, how in logic can the English courts decline a jurisdiction in divorce with regard to the same marriage, seeing that the French courts would recognise the competence of the national court in this respect?

12. An argument in favour of the Renvoi-theory is sometimes framed as follows: Suppose that an Italian judge is called on to examine the intrinsic validity of a marriage between two English people domiciled, at the time of its celebration, in Italy. He will be referred by the Italian Code to the English law as LNat., and he finds that it wishes the marriages of its citizens to be regulated by their LDom. Why, it is asked, should he not apply this latter, *i. e.*, the Italian law? Is it supposable that the Italian legislator pretends to safeguard the interests of Englishmen better than the English law does? How can he declare the marriage null for non-observance of English rules of internal law when he knows that the English judge, applying his own international law, will declare it perfectly valid? Of a solution in such a sense no one can complain: not the Italian legislator, for his judge exactly follows his directions; not the English legislator, for he sees the Italian judge deciding the question just as his own judge would have done; not the parties, for they cannot complain of being judged abroad as they would have been by their national law. All then are content; this is the correct solution.

Obs. 1.—This argument differs from the two former in being one of principle and not of mere expediency; accordingly, Buzzati (p. 66), from whom the above is, in substance, taken, meets it (p. 89) by considerations derived from an examination of the basis of the rules of I.P.L.: if that basis were Courtesy or Caprice, he admits that the argument would have weight; but, finding the rules in question to be based on Jural necessity as interpreted by the lawgiver who frames them, he refuses to admit the argument as valid.

Obs. 2.—"Is it supposable that the Italian legislator "pretends to safeguard the interests of Englishmen better "than the English law does"? This argument was much resorted to in the discussions which led to the Hague resolution of 1894, hereafter referred to (p. 71).

Obs. 3.—The argument in para. 12, it is submitted, is much

more forceful if we start, as the Italian law does, from the conception of Nationality than if we start, as the English law does, from the conception of Domicil. Let us imagine that an English court is dealing with the marriage-capacity of English subjects domiciled at the time of their marriage in Italy. Renvoi here would mean: Eng. LFor. → Ital. LDom. → Eng. LNat. It is a little difficult to imagine an English judge justifying this acceptance of Renvoi by the remark, "Is it supposable that the English law pretends to "safeguard the interests of persons domiciled in Italy better "than their LDom. does?"

Very similar to the reasoning in para. 12 is that adopted by Sig. Pasquale Fiore, professor in the University of Naples, in a study of the Renvoi-question published in Clunet's *Journal* for 1901. After premising that certain matters fall within the exclusive competence of the territorial legislator (*e.g.*, the regulation of property situate within his territory), Fiore claims that all matters connected with the legal person—capacity, family law, succession on death—ought to be allowed to belong to the exclusive competence of that person's national legislature. He then assumes that the legislative sovereign of such a State as England, which accepts domicil as the test of the personal statute, is in effect saying, "I allow my subjects to form with that other State in "which they are domiciled such a tie as will cause their "personal statute to be governed by the law of that State, "without requiring them to abjure their original nationality "in order to obtain that result." Fiore then assumes, further, that when an Englishman becomes domiciled in Italy, he does so with the full knowledge that English law will attach that result to his change of domicil, and with the intention of procuring for himself the consequential change in his personal statute. And if an Italian judge has to say what law will govern the movable succession of such a person, and has to decide, for that purpose, between the (English) LNat., which is indicated by the Cod. Civ., and the (Italian) LDom., to which the LNat. would refer, Fiore demands a

decision in favour of the latter. Any other decision, says he, would involve a fundamental misconception of the principles of legislative competence (p. 688), and would imply that the Cod. Civ. (in its rules with regard to the succession of foreigners) is to be deemed obligatory on all people in the world and on all sovereigns. It would, moreover, says he, be contrary to the presumed intention of the deceased himself, who may be taken to have fixed his domicil in Italy, relying on his belief that he thereby, under and with the concurrence of his national law, submitted his movable succession to the law of Italy (p. 691). To apply to his succession the internal law of England would be an attack on the international rights of man, one of which is the right to have his civil rights everywhere regulated by his LNat., so far as the public order of other States is not assailed thereby. However much Fiore's argument may justify an Italian judge, dealing with the personal statute of an Englishman domiciled in Italy, in accepting the Renvoi, the reader will have observed that it is dead against the reception of Renvoi by an English judge dealing with the same question: but it is sufficient, for all practical purposes, to remark of his argument that its fundamental premise puts it completely out of court in England, for it requires an English tribunal, if concerned with the personal law of an Italian subject domiciled in England, to apply the Italian law as being the LNat., and as wishing to be applied. Much may be said for this recognition of the supreme claims of nationality;[1] but, while the principles adopted in England remain what they are, it is obviously impossible to admit the premise.

13. In 1895 Herr Julius Schnell, one of the heads of the Bavarian Ministry of Justice, published a remarkable article in Böhm's *Zeitschrift für internationales Privatrecht* (Vol. V, p. 337), which is considered (*see* Kahn in *Kritische Vierteljahresschrift für Gesetzgebung*, 1903, p. 614), to have been a factor of great importance in determining the shape

[1] See a similar argument by M. de Vareilles Sommières in Clunet, 1900, p. 275.

taken by the rules of I.P.L. adopted in the new Code of the German Empire. Schnell disclaims any intention of dealing with the Renvoi-question; he is, professedly, occupied with the question how far any given State is competent to enunciate rules relating to the dominion in space of legal systems in general; but, as will be seen, the two questions are vitally connected. The reader will understand that the following summary represents most inadequately the charm and cogency of the original.

The view prevails, says Schnell, that it is the task of a local lawgiver to fix, not only the limits in space of the dominion of his own system, but those of all foreign systems. This conception accounts for such codification of the so-called rules of I.P.L. as we find in Artt. 6—10 of the Italian Code. It leads also to the doctrine that the local judge in applying foreign law can never apply the rules of that law with regard to its own dominion in space.

Schnell proposes to show that the conception in question is inconsistent with the doctrines of international law and with the fundamental principles on which the public order of every civilized state rests and that it is in practice unworkable.

No State claims dominion over the whole globe and over all people and legal relations upon the globe—not even as a working assumption for its officials. Such an instruction to its officials would be an inroad on the recognised sphere of dominion of foreign States, and would stand in sharpest contradiction with the principles of civil procedure, which is designed to declare existing rights and not to create new ones, and with the internal rules concerning the limits in time of the dominion of legal systems, and especially with *that protection of duly acquired rights which every civilized state recognises.* A State which adopts the rule that rights of succession are fixed at the time of the death of the deceased cannot possibly decree that a succession concerning which a suit arises should be determined by the *lex fori.* To decree this would be to determine the succession by reference not to

the death of the deceased but to some later epoch arbitrarily selected by the plaintiff, and to displace rights which arose, on its own showing, at the death of the deceased. But, in point of fact, all civilized states admit that the mere circumstance that a legal relation comes to be pronounced on by their officials does not entitle their officials to regulate that relation. Jurisdictional power does not, save in exceptional cases, imply legislative power.

When a place or person or legal relation is outside the dominion of a given system of law, that system cannot arrogate to itself a paramount right to declare what foreign authority is to exercise its sway over these places, persons and legal relations. The German Empire is as little entitled to demarcate the boundaries between a French and a Spanish province as to cede a province of France to Spain; it is just as little entitled to prescribe to Spain and France how these two States are to regulate the acquisition of the nationality of one State by a subject of the other; and it is not any the more entitled to prescribe how these States are to settle the boundaries of their respective legislative authorities in the departments of Private law.

Further, a local legislative system cannot arrogate to itself a similar control by way of instructing its officials to assume, in cases which may come before them for decision, that the boundary between France and Spain runs otherwise than these two States have agreed, or that the acquisition of French nationality by a Spaniard is subject to other rules than France and Spain have laid down, or, lastly, that the personal relations of a Spaniard domiciled in France (and *vice versâ*) are to be determined by other laws than those agreed on between France and Spain. In other words: jurisdictional power does not, save in exceptional circumstances, imply a power to demarcate boundaries any more than it implies legislative power. Boundaries can only be demarcated by the owners of the things the bounds of which are to be demarcated. A State which should declare that the *lex fori* is to decide whether the succession to the estate of a

subject of State B, who died domiciled in State A, is to be governed by the LNat. or by the LDom. of the deceased, causes (just as does a State which subordinates the succession directly to the *lex fori*) the regulation of the succession to depend upon another moment of time than that of the death of the deceased. And such a State would be making use of civil procedure in order to disturb and not to protect existing rights. *E.g.*, the Saxon Code[1] regulates intestate succession by reference to the law of the last domicil. A Saxon court has to apply this rule to the succession of an Austrian who died domiciled in France. Now there is a convention between France and Austria, whereby movable succession is subjected to LNat., in this case Austrian law: nevertheless the Saxon court must apply French law. Again, the Italian Code regulates succession by reference to the law of the deceased's nationality. An Italian court has to apply the rule to the immovable property in Russia of a deceased German. Now there is a convention between Russia and Germany, whereby in such a case the *lex rei sitæ* is to govern, *i. e.*, the Russian law: nevertheless the Italian judge must apply German law. The prevailing conception, then, leads of necessity to the conclusion that a judge of State A must deny legal efficacy to a Treaty made between States B and C with reference to a matter lying within the sphere recognised by State A as belonging to States B and C.

A lawgiver who defines the limits in Space of all the systems of law on the earth's surface, so far as concerns cases to be decided by his judges, and who, merely because a foreign legal relation comes before them, subjects it to a rule to be determined by the *lex fori*, acts no less arbitrarily than a legislator who places those foreign legal relations in direct subjection to his own local law. In both cases a legal relation is pronounced on by a law which as regards Time and Space is chosen by the plaintiff, instead of by the law which already has seisin of it. This is most clearly shown

[1] This was written in 1895.

in the case of Inheritance: *e. g.*, an Italian dies domiciled in Spain, the rights of his heirs arise at the moment of his death, the rules of Italy and Spain are in agreement that the law of his nationality regulates the succession; it ought not to be possible that those rights of the heirs should be arbitrarily disturbed merely because it occurs to someone else to sue the heirs before a tribunal which is neither Spanish nor Italian. Yet this is what would happen if the Saxon rule, referred to above, were to apply.

The following objection, Schnell continues, is made to this doctrine: If a local lawgiver only regulates the operation in Space of his own law, his judge, in a case not subject to the local law, is left without any starting-point for a decision as to which foreign system is applicable. Not so. The decision should follow the same fundamental principles which are followed in determining whether a place or a person belongs to any given State. If a decision of a German official depends on the question in what country Seville is, the official will decide that it belongs to Spain, not because any German Statute has said so, but because no State other than Spain claims dominion over Seville. If (*e. g.*, for extradition purposes) a German official has to decide on the nationality of a person whom one State and no more claims as a subject, the decision will be in favour of that State. So it is with a judgment of Private law. If a German judge has to say who is entitled to the property in Spain of a deceased Spaniard, he will, directly he ascertains that the German law makes no claim to regulate the succession, determine it in accordance with Spanish law: and this he will do, not because any German Statute remits the determination to the Spanish law, but because no other State than Spain makes a claim to regulate the succession. *The judge applies that foreign law which wills to be applied,* and never applies foreign law (to borrow Westlake's excellent expression)[1] "in the teeth of that law itself."

[1] Of this expression Kahn says (Jhering's *Jahrbuch*, Vol. XXX, p. 77), when criticising the English cases of the *Collier* v. *Rivaz* type: "Plausible as this sentence sounds,

But what if two foreign legal authorities make conflicting claims to govern this legal relation? The judge will then obtain a starting-point in the principles which his own system contains with regard to the operation in Space of its own rules: *e.g.*, German law regulates the intestate succession of a German by reference to German law, irrespective of Domicil, and so if a German judge has to deal with a case where each of States A and B claims to govern the succession of a subject of State B who has died domiciled in A, he will decide in favour of State B, because this decision will give effect to the German views as to what is involved in the relation of a person to the State of which he is a subject. The decision in this case is, however, the same as would be given by the traditional system controverted, and the erroneous character of this system appears more clearly if we suppose that States A and B agree in referring the succession to the law of the last domicil, *i. e.*, A. According to the prevalent doctrine the rules of State B must be applied, even against the will of State B.

Buzzati (*Rinvio*, p. 119...) criticises the doctrine of Schnell as follows:

"It rests on two errors—one of fact and the other of law. The first is to believe that States will always be in accord with regard to the distribution of legislative competence, and that it can never happen that a person, a thing, or a juristic relation which Italy, by reference to some criterion, believes subject to it, can, by reference to other criteria, be believed by Germany or a third State to be subject to itself. The second error, of law, is in the supposition that a person or a thing is subject to the sovereignty of a State because it is governed in a special case by the laws of that State—this may be so for all those States which admit the principles of nationality, but not for all those

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" suggesting in its pregnancy some classical maxim of the law, and logical as it may seem " that *lex domicilii* should not be *lex domicilii* if the *lex* in question says there is no " *domicilium*, yet the Renvoi here rests on a fallacy. We arrive at that dissonance of " decision which we are intending to avoid, for the French judge is just as much entitled to " say, 'By my law the English law is *lex domicilii*, because the Englishman resident here " 'has not obtained governmental authorisation, and therefore retains his original domicil, " 'and, as English law holds that the domicil is French, I must apply French law' (as " was actually done by the Court of Appeal of Toulouse in 1880; Clunet, Vol. VIII, p. 61). " We come into a circle: we commit a *petitio principii* in that we tacitly assume that " which is to be proved, and which in the end we repudiate, *i. e.*, that the foreign law is " true *lex domicilii*, for, except it be so, we have no right to bring it into consideration at " all." How Mr. Westlake meets this argument will appear later on.

which prefer the criterion of domicil, *e. g.*, England. An Englishman remains always an English subject even if, being domiciled in France, he is governed by the French law. Nor does France imagine him subject to France's sovereignty. When these two errors are noted the whole theory of Schnell collapses.

"But other observations may be made. If it be true that the Italian legislator in drafting Prel. Disp., Art. 8, and the judge in applying it to the case of the succession of a German in Russia (as in Schnell's earlier example), commits such an enormous violation of the sovereign rights of Germany and Russia as to be inconceivable, how comes it that the German judge (in the example at the end of Schnell's article) commits none against State A, when against its sovereign order he applies the law prevailing in B?

"Again, if it be true that the Italian legislator cannot pretend that Art. 8 is applicable, and the Italian judge ought to consider it as not written, in a case relating to the immovable succession of a Russian in Prussia, because by doing otherwise legislator and judge would commit an offence against Russian and Prussian sovereignty similar to that of which they would be guilty in declaring and pronouncing Pomerania to be annexed to Russia, why would the Italian legislator in declaring and the Italian judge in pronouncing that an Italian domiciled in Prussia is governed by Italian law, not be committing an offence against Prussian Sovereignty equal to that of declaring Berlin a subject city of Italy?

"Finally, in the example given by Schnell of the judgment pronounced by the Italian magistrate with regard to the succession of a Prussian in Russia, it is intelligible that the Italian judge, erroneously interpreting Art. 8 (applying, *i. e.*, the theory of Renvoi), can be remitted by the Italian rule of conflict to that of Prussia, and decide as Prussia and Russia wish. But in many other cases this is absolutely impossible. Suppose that the Prussian deceased were domiciled in Denmark and that the judge were English: the judge will be referred by the English rule of conflict to the Danish rule of conflict; but the latter prefers the criterion of domicil and will therefore apply the Danish internal law, and every way will be found closed whereby to arrive at the application of the law prescribed by Russia and Prussia. How is it ever possible to suppose, how is it ever possible to understand, that in such a case the English and the Danish judges should be unmindful of the rule of conflict prescribed to them by their respective legislators, in order to obey that prescribed by the Russian and Prussian? Or would not this case be perhaps equivalent to that in which Denmark should make a present of Jutland to Prussia, and England make a present of Wales to Russia?"

Obs. 1.—Schnell's article was written in contemplation of *lex ferenda.* An English judge, called to pronounce on the Renvoi question, is, if he does not find himself bound by *lex lata*, also in presence of *lex ferenda. Lex lata* consists, for him, of the case-law already set out, and of certain general

propositions, borrowed from Continental jurists because at the time they were deemed to represent uniform international practice. Since that time, and largely owing to the development of the Nationality-idea in Private law, international *practice* has ceased to be uniform in many of the matters to which these propositions apply. Further, it may be, as Schnell maintains, that these propositions are founded on erroneous conceptions of inter-State relations, and are therefore defective in *theory*. It is, then, within the province of an English judge who stands (so to say) at the meeting-place of *lex lata* and *lex ferenda*, to consider whether it be desirable, proper and possible, to allow this dissonance of practice or this (alleged) defect in theory to re-act on English doctrines. If, finding that it is desirable and proper, he finds also that the adoption of the Renvoi-theory renders it possible, the Renvoi-theory is to that extent justified.

It will be noticed that the case put in the last sentence of the summary is practically that before Mr. Justice Stirling in *In re Trufort* (*ante*, p. 16), and Schnell's whole article may be read as a theoretical defence of the decision in that case so far as it accepts the Renvoi.

Obs. 2.—"The judge applies that foreign law which wills "to be applied." This is at the bottom of the whole Renvoi-theory. It is in sharp contradiction with the principle laid down by Gebhard when the rules of I.P.L. of the new German Code were first formulated: "The foreign law is "applied, not because it desires but because the municipal "law declares that it is applicable." (See later, p. 73.) The German rules ultimately took a shape not entirely consistent with Schnell's dictum.

14. Von Bar, like Schnell, insists that the rules of I.P.L. are—or ought to be—nothing more than declarations by a given legislative system of the limits of its own competence: it is convenient to assign here a separate section to certain other doctrines of this distinguished jurist.

In the second edition (1889) of his great work on I.P.L., he devoted two or three pages (pp. 208—210 of Gillespie's

Translation : Art. 94 of the original) to the question of conflict between two conflict-rules, of which the one adopts Domicil as the criterion of the personal statute and the other adopts Nationality. He distinguishes what he calls a positive conflict between these conflict-rules from a negative conflict between them: there is a *positive* conflict when each of two legal systems claims to decide a question in issue, *e.g.*, both Italian and English law claim to govern the movable succession of an Italian subject domiciled at death in England; in the converse case of an English subject dying domiciled in Italy, there is a *negative* conflict, for each legal system denies that it applies and remits the matter to the other. It is where there is a lacuna, caused by this negative conflict, that the Renvoi-theory appears. In such cases von Bar approves the results of Renvoi while not accepting the principle: this attitude he maintained in an article contributed in 1898 to Böhm's *Zeitschrift für I.P.R.* (pp. 177—188), and also during the discussions of the Institute.

At the meeting of 1900 von Bar proposed the following rules for the acceptance of the Institute:—

"1. Chaque tribunal doit observer le droit de son pays en ce qui concerne l'application des lois étrangères.

"2. Pourtant, s'il n'y a pas de disposition contraire expresse, le tribunal, conformément aux principes du Droit international privé doit respecter:

"*a.* La disposition d'une loi étrangère qui, en renonçant à lier ses nationaux quant au statut personnel en pays étranger, veut que ce statut personnel soit déterminé par la loi du *domicile* ou même par la loi du lieu où l'acte dont il est question a été fait;

"*b.* La décision de deux ou plusieurs législations étrangères qui, pourvu qu'il soit certain qu'une d'entre elles est nécessairement compétente *s'accordent* en attribuant la décision d'une question à la même legislation."

We are concerned with *2a* and *2b*, and will deal with them successively. Stated in terms of Renvoi, the former will be represented by such a case as the following (in which the question may be supposed to relate to marriage-capacity): Ital. LFor. → Eng. LNat. → Ital. LDom. The reasoning by which von Bar approves of this *result*, is that England refuses to follow her subjects abroad so far as private law is

concerned; that there is, therefore, no English nationality in the sphere of private law; and that, as the Italian judge cannot, in obedience to his Code, apply the national law, where none exists, he must apply Italian law—either on the ground that, in doubt, the law of the forum must be applied, or because, there being no national law, the law of the domicil (Italy) must be allowed to resume the sway which it exercised in Italy in the days before LNat. was adopted as the criterion of the personal statute. (Gillespie's Transl., p. 209; Böhm's *Zeitschrift, loc. cit.*, pp. 180 and 185; *Annuaire*, 1900, p. 155).

Obs.—In effect, as von Bar himself remarks, this is simply the engrafting of an exception upon the rule which declares nationality the test of the personal statute. Nationality is not to be the test in the case of persons whose national law adopts for that purpose some other test than nationality. He does not suggest that a similar exception should be engrafted upon the rule which declares domicil to be the test of the personal statute, and, therefore, *2a*, as stated, does not affect an English lawyer. Mr. Westlake, however, goes a step further than von Bar (*see* pp. 60–1, *post*) and would allow the exception in both cases; and Farwell, J., adopted the doctrine of von Bar, *mutatis mutandis*, in *In re Johnson* (*ante*, p. 19), arguing in effect that there would be no Domicil for the purposes of civil law in a State the law of which regulated the personal statute by LNat., and not by LDom.

Kahn (in Jhering's *Jahrbuch*, Vol. XXX, p. 35) has the following remark: "Von Bar's reasoning makes our law (*sc.* "which refers the personal statute to LNat.) a mere *idem per* "*idem* statement, *i. e.*, that the personal statute (in an ob-"jective sense, *i. e.*, the civil rules which relate to a person as "such) is to be regulated by the personal statute (in a sub-"jective sense, *i. e.*, subjection of a person as such to a given "system of civil law)." But this criticism seems unwarranted: does not the law in question mean, "Of the various territorial "systems of law we select, as regulative in Germany of a "man's personal statute, that which prevails in the legal area

" with which he is connected by the tie of political allegiance, " always premising that that legal system deems that its rules " concerning the personal statute should apply to that man "?

More effective, perhaps, is Kahn's subsequent criticism :

"The unserviceableness of von Bar's solution is decisively shown in the practical cases which gave rise to it, *i. e.*, the cases of collision between the French law of succession and that of a State which, like Italy, regulates succession by reference to the law of the nationality of the deceased. French law looks to the domicil (Art. 110, Cod. Civ.) but only in matters of succession, the personal statute in other matters being determined by nationality (Art. 3, Cod. Civ.). Surely von Bar cannot maintain here that 'there is no nationality, in the technical sense, in the area of private law.'"

15. The following extract (*Zeitschrift*, *loc. cit.*, page 183), explains and illustrates 2*b*, the second of von Bar's theses with which we are concerned :—

"The doctrine," writes von Bar, "which (contrary to Renvoi) deems that the reference to foreign law is a reference to the foreign material law, leads to the following absurd result. X is a subject of State A and is domiciled in State B : he intermarries in B with Y, also a subject of A, according to the forms required by B. Both A and B determine questions of marriage-capacity by reference to the law of the nationality. Doubtless it will be considered by everyone that no conflict can arise as to the law which is to govern the validity of this marriage : it must be that of A. Suppose, however, that later on a question arises concerning its validity before the courts of State C, which determines marriage-capacity by reference to the law of the Domicil. The opponents of Renvoi will insist on the application by C of the law of B, —a law which neither of the parties could have thought of : and it may be that the judge of State C may have, on this theory, to declare a marriage void which both B and C held to be good. Or again : X, a subject of State A domiciled in State B, dies and by the law of both A and B his inheritance devolves according to the law of his nationality and falls on Z. For a long time no question arises ; but, later on, Z has to sue one of the debtors of the inheritance before the courts of State C, which refers question of inheritance to the law of the Domicil ; this debtor sets up that, by the law of the Domicil, Z is not the heir ! These two examples show that the repudiation of Renvoi throws every legal relation into confusion : no one can foresee what the courts are before which questions, up to that time settled by all concerned, may possibly come and what principles the *lex fori* may adopt. If, however, the rules of private international law are framed as declarations of competence, the court of State C would say in each of the above-suggested cases, 'At the time of X and Y's intermarriage, or, at the time when X's succession was opened, the law either of A or B was competent

and both agreed that the law of A was competent. This law has established the legal relation in question: there is no other law which has a reasonable title to vary that adjudication. Consequently I must decide the question by reference to the law of A as it stood at the time in question.'"

Obs.—Kahn (*Krit. Vierteljahresschrift für Gesetzgebung*, 1903, p. 622) admits that advocates of Renvoi find a plausible practical result in such a case as the above. He points out, however, that it requires an attention to, and an examination of, foreign conflict-rules which would throw a great burden on a local judge. And he asks, what would be the result if, besides LNat. and LDom., LActus was involved? Is the congruence of all required? Westlake (*see* pp. 61–2, *post*) deals with just such a case.

16. One of the first things to arrest the attention of a theoriser in the domain of I.P.L., is the difference between law as mere juristic material and law as a vital manifestation of sovereign authority. Thus, Art. 763 of the Italian Code whereby testamentary capacity is acquired at 18, is, in Italy and in the case of an Italian subject, law of the latter kind; but, outside the area within which the Italian sovereign can cause the rule to apply, it is merely juristic material. Upon this distinction an ingenious argument in favour of Renvoi (or of its results) has been based by Herr J. Keidel, writing in Clunet's *Journal*, 1901 (see esp. pp. 88, 89 and 95): he marks the distinction by speaking on the one hand of a mere '*règle juridique*,' and on the other of a '*règle juridique*' which has been quickened into '*loi*' by '*la formule impérative*' of a sovereign. Let us, *e.g.*, suppose that an English court has to decide on the testamentary capacity[1] of a Frenchman domiciled in Italy and that it refers to the local Italian law as LDom., *i.e.*, to Art. 763 above named; the English court may think that it is thereby applying Italian *law*, but this is not the case; it is only applying juristic material of Italian origin, for no imperative formula of the Italian sovereign renders Art. 763

[1] I.e., *quoad mobilia*.

applicable to Frenchmen. For the English court to insist on applying Italian internal law to the case, means that the imperative formula is derived from English sovereignty: but what has English sovereignty to do with the testamentary capacity of a person who was not subjected to it either *ratione personæ* or *ratione territorii?* In asking this question Keidel adopts the same position as Schnell (p. 36, *ante*) and von Bar (p. 44, *ante*), and we need not dwell on this point. Rather let us notice that, although, in this case, Keidel would approve of the ultimate adoption of French law, the reason would not be in the fact that Italian law (Prel. Disp., Art. 6) declares French law applicable. Assuming the case correctly represented by: Eng. LFor. → Ital. LDom. → Fr. LNat., the cardinal fact would be, not the *Weiterverweisung* by the Italian law (for, in Keidel's eyes, French '*loi*' is only '*règle juridique*' as regards Italian sovereignty) but the (practical) acceptance of the *Weiterverweisung* by the French Sovereign. Similarly with regard to Renvoi proper (*Rückverweisung*): suppose, *e.g.*, the case before the English judge be one concerning the testamentary capacity of an Englishman domiciled in Italy, the result of: Eng. LFor. → Ital. LDom. → Eng. LNat., is approved by Keidel, not, however, because of the Renvoi made by the Italian law but because (assuming it to be the case) the English sovereign accepts that Renvoi or gives coercive force to the English local law of capacity, not only in the case of domiciled Englishmen but also in the case of English subjects domiciled in a country the law of which purports to regulate capacity by reference to LNat. For such a purpose the English judge is the representative of the English sovereign.

Obs. 1.—Keidel's object was to justify the Article in the new German Code (*Einführungsgesetz*, Art. 27; *see* p. 72, *post*) which authorises the German judge to apply German law in some of the cases of: Germ. LFor. → Eng. LNat. → Germ. LDom. The practical value, to an English judge, of this pretty piece of dialectic, is that, if, in a case like: Eng. LFor. → Ital. LDom. → Eng. LNat., he be minded to pro-

duce the same result as if he "accepted the Renvoi," he can, while professing respect for his existing rules of I.L.P., say, "There is no '*Law* of the Domicil' for this case: as it is "impossible to apply my rule of I.P.L. I must apply my "internal law." Be it noted, however, that if, on the other hand, the English judge were minded to give to his rule of I.P.L. its traditional meaning, and to stop at: Eng. LFor. → Ital. LDom., it would still be open to him to say, "I borrow "from the Italian Code the *règle juridique* and, substituting "it for the corresponding English *règle*, I, as representing the "English Sovereign, apply the imperative formula and give "the requisite coercive force and vitalise it into law."

17. We pass now to some arguments of the opponents of Renvoi: and, in so doing, it is essential to bear in mind that what is here criticised is Renvoi itself and not the expediency of admitting, in certain exceptional cases, a treatment of international problems which will give the same results as Renvoi. The naked question is that stated by Labbé (Clunet's *Journal*, 1885, p. 9)[1]: When a lawgiver abandons to a foreign system of law the determination of a legal question, does he ask this system to decide what law is applicable or does he seek in this system the solution which the legal question ought to receive?

18. If the basis of I.P.L. is to be found in ideas of Comity, and the foreign system to which this voluntary deference is paid declines, in any given case, to accept it, a judge may reasonably apply his own law: but this doctrine of Territoriality tempered by Courtesy is discredited and the rules of I.P.L. are now to be treated as dictates of jural reason, or of what passes for such in the eyes of the law-maker who accepts them. When a French law places a question under the authority of a foreign law, the meaning, says Labbé (*loc. cit.*, p. 11), is this:—

"Not that the French legislator, whose business it is to show the judge his duty, abdicates and renounces his mission; not that the determination of the law which is applicable, is a matter of indifference to him; but that he

[1] This seems to be the earliest theoretical discussion of the question.

deems it jurally correct that such and such a point of law should be regulated by such and such a system because that system is best fitted to appreciate the factors of which the rule should be composed. Such and such a system, says the lawgiver, is applicable. It matters little that the foreign system in question would not adopt the same principles. The domestic lawgiver does not bow down before the foreign law in order to receive from it a theory of international law. He borrows from the foreign law the solution of the question and tells his judge that this is the correct and just solution. He does not abdicate; he pronounces. Not that he claims a universal competence but that in no case does he refuse to supply his judges with a guidance which is not haphazard and capricious but based on deliberately and scientifically selected principles."

M. Lainé, like M. Labbé, a professor in the law faculty of Paris, expands this idea in the following passage (Clunet's *Journal*, 1896, p. 255):

"If the French legislator, in referring to a foreign law a jural matter, *e. g.*, the regulation of a movable succession left in France, or the status and capacity of foreigners domiciled in France, meant thereby to attribute competence to the internal rule of such foreign law concerning successions or status and capacity, he was acting consistently with his duty as a legislator, and his line of action, if criticisable in correctness was at any rate intelligible. As regards movable succession, his thought was that, like immovable succession, it ought to devolve according to the law of the place where it is situated because the regulation of successions belongs, in every country, to the domain of property, of public order, of social conditions—but since movables may in point of fact be widely scattered, he has adopted the convention that they are deemed situate at their owner's domicil, and has even pushed the fiction to its limits by giving domicil its legal signification. We are at liberty to consider this order of thought defective and on the one hand to maintain that the regulation of successions ought to belong to family organisation and be, in consequence, submitted to the national law of the deceased, and on the other hand to urge that even if it be treated as belonging to the domain of property, the movables of a succession ought logically to be deemed situate rather at the actual than at the (merely) legal domicil. But at any rate the rule adopted by our legislator is reasoned and intelligible even if it does not command our entire approval. The case is the same with the rule which submits a foreigner's status and capacity to the law of his country. The legislator has here chosen nationality as the criterion because he deems that there is an intimate bond between nationality and personality. The idea is an old one. In former days, some authors expressed it by saying that the qualities impressed on a person by the law of his domicil ought to accompany him everywhere as if they inhered in his bones: the figure is even more appropriate in our days when the law of the nationality has replaced that of the domicil.

"Suppose however that when a French legislator submitted such and such jural relations to a foreign system he acted upon quite other grounds and proposed to refer the solution of the conflict between French laws and foreign laws to the arbitrament of a foreign system. Would not this be an inconceivable dereliction of duty? What! Is it to be said that our legislator has disclaimed all share in the conflict, has declared that the solution is to him indifferent, that all systems are equally good in his eyes and, especially, that even if it were fitting to apply the law of the nationality to determine the status and capacity of Frenchmen yet as regards foreigners it is none the less fitting to apply, at the bidding of some foreign legislator, either the *lex domicilii* or the *lex actus* or the *lex rei sitæ!* Odd that he should legislate in order to say that he was not legislating."

19. Opponents of the Renvoi-theory naturally attach great weight to the form in which the accepted rules of I.P.L. are enunciated, and the argument is one which cannot but be admitted as very cogent by an English lawyer. M. Lainé puts it as follows (Clunet's *Journal*, 1896, p. 254):

"The very shape of the rules of private international law which prescribe the application of foreign laws shows clearly enough in what sense they are to be understood. To say that in movable successions the law of the place where the deceased had his legal domicil is to be applied—to say that the law applicable to a person's status and capacity is his national law,—is not this to indicate a rule of succession in the one case and, in the other case, a rule of status and capacity, and in both cases a rule of internal law? Surely the proof lies in the fact that there would be no hesitation so to understand the matter if the same rule prevailed everywhere. Aforetime, *i. e.*, during the five centuries in which the conflict of laws has been studied in Europe, when any diversity of solutions prevailed rather among jurists than among legal systems, no one, whether jurist or judge, fell into this mistake. It is only in our own day when rules of private international law have been developed (*sc.*, in separate systems) side by side with rules of internal law that the verbal ambiguity, with its resultant errors, could arise. Ought not the words employed (*sc.*, in the traditional rules of private international law) to be understood in their traditional meaning? If the rules had the meaning attributed to them in some recent case-law they ought to be expressed in a different manner and ought to run, *e. g.*, '*The conflict of laws will be settled* in matters of succession by the law of the place where the deceased had his legal domicil and in matters of status and capacity by the person's national law.'"

20. We will next refer to an argument, rightly deemed to be fatal to the Renvoi-theory in its strict signification: we will call it the argument of *circulus inextricabilis*. The following extract will explain it:—

(A) Von Bar, in the 1889 edition of his work on I.P.L. (*see* n. 47, p. 209, Gillespie's Translation), was dealing with the following case, decided in 1861: Frankfort LFor. → French LDom. → Frankfort LNat. The reason given by the court for adopting the LNat. was: "If the principle "whereby the LDom. applies, is followed out as it should be, "it requires that the law which prevails at the domicil of the "deceased should be applied in its totality, and the succession "therefore should be treated exactly as it would have been if "it had fallen to the Courts of the domicil to deal with it." In this way, says von Bar, recognition was given to a kind of reference or relegation to the other law (LNat.), *it being always assumed that LDom. really had the force which it was represented to have.* This reasoning, says he, is untenable: it leads to a *circulus inextricabilis*, to an unending reference from the one law to the other. [The assumption contained in the italicised phrase is, it will be observed, vital to the Renvoi-theory.]

(B) Buzzati (*Rinvio*, p. 77) has the following passage:—

"By interpreting the simple rules of conflict in the sense of Renvoi, it is not true that we arrive at this or that solution, but that we succeed in not obtaining any decision at all. The doctrine of Renvoi means nothing else than a change in the character and function of conflict-rules. Till now they have been understood to determine the internal law directly applicable to a juristic relation. Instead of this, the Renvoi doctrine would have them exercise the function of indicating the laws which determine the internal law directly applicable to a juristic relation. Now, admitting that this is proper, it follows that all conflict-rules ought to be understood in that sense. What is the upshot? An eternal Renvoi from one rule of conflict to another without ever descending to the application of an internal law, a closed circle with no exit. *It is the application of lawn tennis to international law.*"

(C) Kahn (Jhering's *Jahrbuch*, Vol. XXX, p. 23) wrote:

"The principle of Renvoi is logically unworkable. If the rule adopted by our system is so framed that the foreign law is to be applied in its totality, including its rules of private international law, it must also be the import of the foreign rule that our law in its turn is to be applied in its totality, including our own rules of private international law. The consequence is—that in virtue of the foreign law ours is applied in its totality and in virtue of ours the foreign law is again applied in its totality and so on and so on: a logical 'cabinet of mirrors' (Spiegelkabinet)."

Obs.—M. Weiss (*Traité*, Vol. III, p. 80) attempts to find an exit from the "vicious circle" in a manner which can hardly please English adherents of the Renvoi-theory :—

"When a foreigner's LNat., to which it belongs to govern his status and capacity, delegates its competence to his LDom., this refers only to the dispositions of internal law freed from all international complications, and not to the general principles applicable to the solution of conflicts of law. The intention of the English legislator, when he manifested his preference for LDom., was assuredly not to allow this law to return to him a problem in the choice of laws: he meant LDom. to have the last word, as being the fittest for that function. The circuit ends here and the vicious circle is purely imaginary."

The initial assumption in this extract, that for the purposes named LNat. is paramount to LDom., is not consistent with English legal doctrine. If a French judge, dealing with the family law of an English subject domiciled in France, were to accept the Renvoi on the authority of M. Weiss's argument, he would certainly be interpreting one conflict-rule (that of the French law which regulates family law by reference to LNat.) in the sense of Renvoi, and another conflict-rule (the English) in a contrary sense. It is only in this illogical way, say the opponents of Renvoi, that escape from the "vicious circle" is possible.

21. After the passage cited above from Kahn, that author goes on to give an illustration to show the similarly unworkable character of Renvoi in the sense of *Weiterverweisung*.

The case put is the following: Fr. LFor. → Pruss. LNat. → Amer. LDom. → Pruss. LActus.

"Suppose a French judge has to pronounce on the contractual capacity of a Prussian domiciled in America, with regard to a contract entered into in Prussia. According to the French Cod. Civ., Art. 3, the Prussian law is applicable as LNat., but the Prussian Landrecht § 23 refers to LDom.[1] Being then bound to judge exactly as the Prussian judge and being bound to apply the Prussian law in its totality, he will have to invoke the application of the American law. Now in America the principle prevails that contractual capacity is regulated according to the *lex loci actus*: hence a Renvoi from the American law to the Prussian and a new Renvoi from the latter to the former. Who can extricate the judge from the circle when once he has accepted the first Renvoi!"

[1] Written before the new German Code came into force.

Obs.—Zitelmann, an opponent of the Renvoi-theory, is cited by Buzzati as disapproving of this example (I.P.R., Leipzig, 1897, p. 241). All interpretations, says he, ought to be given in such a manner as that a reasonable result will ensue. It does not follow that, because the first (French) rule is a Renvoi-rule, the Renvoi is subsequently to be admitted: ***non constat*** that the French legislator had not special reasons for admitting the first Renvoi (from Prussia to America) without having any desire for a second Renvoi (from America to Prussia). To which Buzzati replies (*op. cit.*, p. 81):—

"It is all very well that every interpretation should be given in a way which will lead to a reasonable result; but, before ascertaining whether the result be reasonable, it is necessary that the interpretation itself be reasonable. But when, in order to arrive at this pretended reasonable result, one has, as a necessary premise, to admit that one and the same rule of conflict (*i. e.*, the Prussian) says one thing when applied by a foreign judge and another opposite thing when applied by a national judge, it must be agreed that both interpretation and result are unreasonable."

Von Bar (Böhm's *Zeitschrift*, *op. cit.*, n. 15, p. 188), deals with Kahn's illustration as follows:—

"Kahn assumes that Renvoi here either leads to a ridiculous result or leaves the judge without instructions. Not so. In this case, either Amer. LDom. or Pruss. LNat. or Pruss. LActus is the law which is competent to determine the capacity in question: these two laws, for there are but two, agree that LNat. is not to apply and that Amer. LDom. is primarily applicable. This latter, Amer. LDom., correctly stated is as follows: It will not allow an incapacity existing under it, but not existing under LActus, to be pleaded in violation of the good faith of a transaction. The Prussian contracting party is therefore to be deemed capable if capable either by Amer. law or by *lex actus*, whichever be more favourable to the validity of the transaction."

This may be a correcter exposition of the law of the American State in question: but is not the case put by Kahn. We shall see shortly (pp. 61–2, *post*) that Westlake would in this case apply French law as the law of the forum (*Annuaire*, 1900, pp. 39, 40). Accordingly, the judge ought to determine the capacity of the party in question, by internal American law (Zitelmann); by the Prussian law,

if more favourable to the validity of the contract than the American (von Bar); by French law (Westlake)! Two suggestions are inevitable: (i) a general Treaty is needed to regulate such matters, seeing that, whether we accept Renvoi or not, a person about to enter into a contract in circumstances like those of the example, can never find a law by which his capacity will be universally determined, and (ii) if a system (say, the English) possesses a settled rule of I.P.L. as to contractual capacity (say, LDom. in matters of Family and patrimonial law and LActus in commercial matters) it may gain nothing, by toying with Renvoi, except an uncertainty more to be abhorred than any theoretical incorrectitude.

22. The basis of the Renvoi-theory is the doctrine that when a conflict-rule refers a matter to a foreign law, the foreign law is referred to *in its totality*. It is urged as an objection to the theory that the complete application of a foreign law is almost impossible. Buzzati (*Rinvio*, p. 83) says:

"By means of Renvoi it is never possible to arrive at a total application of a foreign law. In the first place, the application of a foreign law will be limited by the public law and order of the State where it is to be applied. But even in cases which do not affect public order, the complete application of a foreign law is almost impossible. When a judge has to decide how to regulate a jural relation which contains elements of international law, he must distinguish between questions of Capacity, Substance, Form and Effects: and it will continually be seen that the relation will be regulated not by one law only but by various laws each dealing with a different element of the relation. Suppose a question arises in an Italian court about the validity of a marriage celebrated in France between a German and an English woman. As regards capacity of the parties the judge will have to apply respectively the German and the English law, as regards form the French law. If he has to deal with the effects of that marriage he will apply—according as he deals with consequences of one or another kind—the German law as the national law of the husband, the law of the place where the parties live, and possibly also the law of the place where the property is which constitutes the *dos* of the woman or the property of the husband, etc., etc. This marriage and its effects will not be decided on by one and the same law unless the spouses are *e.g.*, both French, living or always having lived in France, married in that state and possessing their property there . . . . But whenever the question is really one of International law, the judge will never apply in its totality one

foreign law only, but as many foreign laws as are by the rules of conflict of the *lex fori* competent to regulate the varying elements of the juridical relation in question. But not even these will he, under the Renvoi system, apply in their totality. Suppose *e.g.* there comes before an Italian Court the question of the validity of a marriage celebrated in England between a Saxon and a Frenchwoman, domiciled in London. The Italian judge who by his rules of conflict relating to capacity will be referred to the Saxon and French rules of conflict, will be called by these (which adopt the national law) to decide on the capacity of the husband by the Saxon internal law, of the wife by the internal French law: here, then, *ex hypothesi*, we have the application in their totality of Saxon and French law. But to decide on the formal validity of the marriage he will have to apply English law, *lex loci celebrationis:* now English law determines *capacity* by the *lex domicilii!* Here, then, is a case to which the judge does not apply foreign law in its totality." [1]

The argument contained in this extract is of exceptional importance to English lawyers, owing to the (regrettable) fact that our rules of I.P.L. so often refer different elements of the same jural relation to different laws. This fact makes it difficult to assent to the doctrine, sometimes laid down, that an English judge, when referred by his rules of I.P.L. to a foreign law, puts himself in the position of the foreign judge. We may take as an illustration such a case as *Guépratte* v. *Young* (1851, 4 de G. & S., p. 217), a case in which a settlement, valid in substance but void in form by French law, and valid in form but void in substance by English law, was held to be good by applying French and not English law to govern the substance, and English and not French law to govern the form of the settlement. The feat of mental gymnastics involved in imagining the English judge to be acting now as English judge and now as French judge, in pronouncing upon one and the same jural unit, *i. e.*, the validity of the settlement, is both difficult and futile.

23. It will be seen later that in several legislative systems Renvoi, or at any rate the result of Renvoi, has been accepted in connexion with the personal statute. M. Bartin has an article in Vol. XXX of the *Revue de Droit International*, in which he minutely discusses this aspect of the question. The solution of conflicts of laws adopted by any

[1] Kahn has a similar argument in Jhering's *Jahrbuch*, Vol. XXX, p. 25.

State as regards the personal statute is, says he, closely connected with the internal character of that State, *e.g.*, it is intelligible that a highly centralised, unitary State should adopt as its criterion the LNat. rather than LDom. to regulate, in its eyes, the capacity of its subjects, and, on the other hand, the looseness of the tie existing between the various members of a Federal system will explain the reception within that system of the criterion of Domicil, and then the subsequent extension of it outside the federation. Hence, says Bartin, these rules are, primarily, not rules of private law but of public law: they translate that State's idea of Sovereignty (p. 276). If they affect the individual, as all rules of law must, they are primarily addressed to the judge, indicating how far his mission goes and not, like rules of private law, how he must fulfil his mission: they do not determine the object of his functions but their limits. When then a State A, accepting the Renvoi-principle, authorises its judges to substitute for its own conflict-rules those of another State, B, in the interest of subjects of that State, A in reality is freeing the subjects of B from rules which are part of its public law. In such circumstances, subjects of B are submitted even on A.'s territory and before A.'s tribunals to the public law of B: A adopts, in short, a fiction of exterritoriality for their behoof. So that the price exacted by the Swiss rules (p. 70, *post*) and the rules adopted in 1894 at The Hague (*ibid.*) is an attack on the Sovereignty of the country to which the judge belongs, an attack in the domain of public law, and therefore an attack which is absolutely inconsistent with the notion of sovereignty (p. 278).

Bartin then contends that the German system (see p. 72, *post*) is obnoxious to the same criticism, though in seeming it is quite distinct from the Swiss and The Hague systems. The latter appeal to the conflict-rules of LNat. in order to respect in the individual's person the sovereignty of the State to which he belongs: the German system applies German law because, on von Bar's theory, it cannot find a LNat. for the individual. In reality, however, the German system is following the lead of the individual's LNat.: the

German law applies itself because the conflict-rules of LNat. demonstrate that the bond of allegiance uniting the individual to his nation does not, in the eyes of his LNat., extend into the region of civil relations: *i. e.*, the German law borrows the negative conceptions of LNat. as to national sovereignty.

All three systems, Bartin concludes, rest on one and the same fundamental doctrine, the application of the fiction of exterritoriality applied to an individual by the judge. The notion of territorial sovereignty leads necessarily to the rejection of such a fiction.

24. In addition to the writers whose views have been indicated in the quotations and summaries contained in the preceding pages, the following may be mentioned:—

Pro Renvoi: Barazetti (see in *Zeitschr. f. I.P.R.*, i, 426); Brocher (Clunet, 1881, p. 13; *Cours*, 1882, p. 167); Jaques (*Verhandlungen*, Berlin, 1886, Vol. II, p. 135); Martin (Clunet, 1883, p. 31); Neumann (I.P.R., 1896, p. 25); Renault (*Actes de la Conférence de la Haye*, p. 46); A. Rolin (D.I.P., 1897, p. 76); Guarini (Rome, 1900); Sewell (*French Law, etc.*, pp. 66, 77).

Contra Renvoi: Anzilotti (*Studi critici*, p. 194); Mignault (*Dr. civ. canadien*, Vol. I, p. 101); Bustamente (*El orden publico*, Habana, 1883, p. 155); Catellani (*Atti del Reale istituto di Venezia*, ser. 7, Vol. 8, p .1647); Chrétien (Clunet, 1886, p. 174); Despagnet (*Précis*, 1891, p. 174); Diena (*Sui limiti all' applic. del dir. str.*, 1898, p. 9); Fusinato (*Riv. Ital. per le scienze giur.*, Vol. XXV, p. 435); Gierke (*Deutsches P.R.*, 1895, p. 215); Niemeyer (*Methodik*, 1894, p. 16); Pillet (Clunet, 1894, p. 721); Regelsberger (*Pandekten*, 1893, Vol. I, p, 164); Surville et Arthuys (*Cours élém.* 1890, n. 30); Stocquart (*Rev. de Dr. Int.*, Vol. XXIII, p. 141); Streit (*Nomike*, 1894, p. 40); Tournade (Clunet, 1895, p. 484); Crome (*Handbuch*, 1894, Vol. I, p. 108); Zitelmann (I.P.R., 1897, p. 238); Ligeoix (Clunet, 1903); Laurent (*Dr. int.*, 1880, Vol. I, n. 441; Sirey 81, 4, 41).

Partly *pro*, partly *contra*: Strisower (*Wiener Gerichtshalle*, 1881, pp. 11, 13).

This list has been almost entirely borrowed from Buzzati

V.

25. Mr. Westlake made two important pronouncements upon the Renvoi-question in connexion with the discussions of the Institute (*see* p. 71, *post*). Both in 1898 and in 1900 he contributed a written memorandum and also took part in the oral debate (*see Annuaire*, 1898, pp. 31—34, pp. 217—219; 1900, pp. 35—40 and pp. 164—168). In 1898 he admitted the Renvoi-theory in certain special cases, rejecting it in general; in 1900 he announced his entire conversion to the doctrine—or, rather, his adoption of a mode of thought which leads to the same results. If this pamphlet possesses no other merit, it will at any rate have served the purpose of rendering the doctrine of this great master accessible for the first time to the English reader.

26. The *consensus gentium* on which I.P.L. ought to rest is now-a-days admittedly wanting, especially—owing to the intrusion of the idea of Nationality—in matters of the personal statute. The question thence arises whether it is desirable and proper that a system which, like the English, still frames its personal statute in the old way, should recognise this change in the international situation by a corresponding change in its rules of I.P.L. If so, one course which presents itself at once to a critic is to examine the reasons why this or that relation was referred of old to LDom. It may be that the reason in some cases points to a connection with the soil or the people living on it, and in these cases there would be no ground for ceasing to refer to the law of that soil, the LDom. In other cases the reference to LDom. might in reality have been a reference to the supreme authority of the area in question, on the assumption, *e.g.*, of some act to be done by him, such as the distribution of property: if for these cases the local *law* would no longer

represent the sovereign will, there would be less reason for insisting on its continued application. It was on these lines that Mr. Westlake approached the problem in 1898, and his conclusions were that, by a limited admission of Renvoi, effect might be given to the results of the analysis. Any such analysis must, however, be largely speculative, and its practical utility would entirely depend on its commanding such an assent as could only be accorded by an act of the ultimate municipal legislator or by international convention.

Admitting that I.P.L. seeks in general for the territorial law which is the proper one to govern a given legal relation and not for a law which is to govern the choice of law, Mr. Westlake maintained that there are legal relations as to which the quest of I.P.L. should be rather for a territorial *sovereignty* to whose sway they may be remitted than for a territorial *law* which shall govern them. In these cases the sovereign authority in question may direct us further afield in our search for the governing *law*.

(1) It is a territorial *law* that I.P.L. points us to in, *e.g.*, the determination of the age of majority: for majority is fixed by reference to the average qualities of a given people. It is, similarly, a territorial *law* which governs the intrinsic validity and the effects of a contract. In neither of these cases is Renvoi permissible.

(2) There are however legal relations in the regulation of which the aim of I.P.L. is, to secure a unity of treatment. Thus, suppose a judge of jurisdiction A is dealing with the movables of a succession which, under his rules of I.P.L., belongs as a *universitas* to jurisdiction B: if the rules of I.P.L. adopted in B declare that the *universitas* belongs to jurisdiction C, and the rules adopted in C agree in this respect with those of B, the judge of A should apply the law of C, because it is in C that the succession will be opened effectively and without controversy. The principle of unity of treatment involves the search for an authority which is entitled to deal with the succession in a sovereign manner: the judge of A finds that authority is the sovereign of C.

(3) Further, there are legal relations in the regulation of which the aim of I.P.L, is to respect the social ideas of a given people, *e. g.*, marriage-capacity so far as it depends on nearness of kinship. The population affected by a given marriage may be defined in terms of domicil or of nationality. In either case it is from the sovereign authority of the selected country that information must be sought as to the ideas there prevalent which it is desired to respect: and that sovereign may declare, in his rules of I.P.L., that he has no interest in a marriage between persons who are connected with his jurisdiction by the tie, be it domicil or be it nationality, on the strength of which the reference has been made to him. Suppose that an English judge is pronouncing on the validity of a marriage between a man and his deceased wife's sister, both parties being English by nationality and French by domicil. The English rule of I.P.L. takes domicil as the criterion, the French rule takes nationality. Why should the English judge abstain from applying the English law which prohibits such a marriage? England is, beyond doubt, interested in the affair by reason of the nationality of the parties; the preponderating interest which English law attributed to the country of the domicil is disclaimed by that country. There is no need, in order to justify the conduct of the English judge, to assume that the *lex fori* is rehabilitated by the refusal of a courtesy proffered by it to the *lex domicilii.*

27. We pass now to Mr. Westlake's contribution to the discussions of 1900:—

(1) He began by insisting that, from the practical standpoint of the legislator, it is impossible to divide a legal system into internal law and international law. Suppose a system says, *e. g.*, (a) Testamentary capacity is acquired at 19; (b) personal capacity is regulated by the law of the nationality. Without rule (b), rule (a) has no meaning. WHO acquires testamentary capacity at 19? No answer at all can be given without (b), which indicates the class of persons whose capacity the law-maker believes himself entitled to

regulate. Rule (a), stated in the light of (b), runs, "For sub-"jects of my state testamentary capacity is acquired at 19," and nothing is said about foreigners domiciled within the territory. Rule (a) taken by itself is in the air, a mere arrangement of words.[1]

(2) The second proposition in Mr. Westlake's note is the following: When a lawgiver frames a rule such as (b) above, it is limited to the cases which the lawgiver deems subject to his authority in the matter. There will be, firstly, the normal cases, *e.g.*, for a Danish lawgiver, who considers domicil the decisive factor, the normal case will be that of a person domiciled in Denmark, and the lawgiver will fix for him 21 as the age of testamentary capacity; for an Italian lawgiver who considers nationality as the decisive factor, the normal case will be that of an Italian by nationality and the lawgiver will fix for him the age of 18. But to go so far involves a further step. The lawgiver who regards a given case as normal for himself must regard analogous cases as normal for other lawgivers and as within their sphere. The Danish lawgiver will direct his judge to hold that the testamentary capacity of persons domiciled abroad is that which is recognised by the lawgiver of their domicil; the Italian lawgiver will direct his judge to hold that the testamentary capacity of non-Italians is that which is recognised by the lawgiver of their nationality. By this second step we settle the following cases: (i) for the Danish judge, the case of a person domiciled in a country like England which similarly determines capacity by the law of the domicil; and (ii) for the Italian judge, the case of a person, *e.g.*, a Frenchman, whose national law determines capacity by the law of the nationality. But we do not settle (i) for the Danish judge, the case of a person domiciled under a system which, like the Italian, says nothing about persons domiciled under it; nor (ii) for the Italian judge, the case of a subject of a State which like Denmark says nothing in the matter about its political subjects.

[1] *Cf.* Von Bar to the same effect in Böhm's *Zeitschrift*, 1898, p. 182 & n. 8.

(3) For the decision of the cases not disposed of in the second stage, a further stage is necessary: the legislator must allow or order a judge, in default of any other law, to apply the normal law of his own system in cases where no other applies. A Dane domiciled in Italy will then be held, in the courts of Denmark, to acquire capacity when he attains the age (21) required by the Danish law; but in Italy he will be held to acquire capacity on attaining the age (18) required by Italian law. This secures the same result as the Renvoi-theory but not by the same route, and it is not obnoxious to the "Lawn-tennis" objection. Renvoi implies the indication of a rule which refers back to the indicator, but the truth is that the rule supposed to be indicated by the indicator does not exist in actual fact, by reason of a difference in theory between the two systems.

(4) Mr. Westlake then cites from his contribution of 1898 the passage summarised in (3) on p. 59, *ante*, but assigns as the reason why in the example given the English judge should apply his own law, the presumed intention of the English lawgiver that if the French law disclaims the deference offered to it, English law is to be applied.

(5) Lastly, Mr. Westlake deals with *Weiterverweisung*. Suppose, says he, the case of two subjects of one of those American States which, in favour of immigration, make capacity depend on the law of the place of contract: these two persons, being then domiciled in France, enter into a contract in Italy and, later, the contract comes before the courts of England. How shall the English judge deal with the question of their capacity? Taking their domicil at the time of the contract as indicating the law-maker to whom the question of its validity in that respect belongs, he asks an answer from France. France replies, "This case does not belong to me; your own (English) rule of competence would have done better had it referred you to the American law-giver." Should the judge accept this advice, the American lawgiver will tell him that the case does not belong to him but to the Italian lawgiver. The English judge, however, is

not compelled by his rule of competence to accept this advice. He will apply the "internal" law which governs the normal cases of his country, and he will be moved so to do by the same considerations as operate in a simple case of Renvoi: *i. e.*, imbued with the principle that I.P.L. is the science of the limits, in space, of legal systems and, taught what these limits are by the rules of I.P.L. adopted in his own country, the judge will determine to what law-maker any given legal relation belongs; should this law-maker, adopting other views as to the limits in question, declare that the given legal relation does not belong to him, the judge's journey abroad is at an end.

Obs. 1.—Mr. Westlake's doctrine that rules of material law must always be read in the light of the rules of I.P.L.—*e.g.*, that the English rule is not "Majority commences at 21," but "Persons domiciled in England attain majority at 21,"—is discussed on p. 88. The corresponding doctrine of von Bar that a statement as to its dominion in space is an essential part of every legal rule, evoked the following criticism from Kahn, in Jhering's *Jahrbuch*, Vol. XXX, p. 28. Let us, says he, distinguish two things from each other: (i) rules which subject a definite legal relation to a definite territorial system, *i. e.*, which delimit the boundaries between various territorial systems, and (ii) rules which merely define limits in space for our own law. The rules of class (i) are the proper rules of private international law and the doctrine in question is inapplicable to them (except upon that erroneous conception of their import by which the foreign law to which they in any given case refer, is incorporated with our own). For how can the rule, "A person's capacity is governed by the law of his domicile" be a constituent part of the rule, "Capacity begins with majority and majority begins at 21?" The two rules are incommensurable and as distinct from one another as a rule about the constitutional requirements of a civil law is from the civil law itself. Nor does the doctrine hold good of the rules in class (ii): it is not correct to say that a reference to definite objects *quoad* space, is as necessarily immanent in

the lawgiver's intention as a reference to definite objects *quoad* thing. What the lawgiver proposes to regulate is the capacity of persons, the family law of husbands and fathers, the successory rights of sons, of cousins, of legatees, the extent of the rights of absolute or limited owners, etc. How far in space his law is to operate is *ordinarily* a secondary concern, matter for a supplementary (*danebenstehende*) rule, even when dealt with in the same paragraph, and even when left to be ascertained by reference to the nature of its material contents. Sometimes, however, a statement as to the spatial operativeness of a rule is a constituent part of the rule, *e.g.*, Art. 108, Cod. Civ. Fr., "Toutes actions contre le commis-"sionaire et le voiturier, à raison de la perte ou de l'avarie "des marchandises, sont prescrites, après six mois pour les "expéditions *faites dans l'intérieur de la France* et après un "an pour celles *faites à l'étranger.*" Here the spatial reference clearly belongs to the content and not to the extent of the lawgiver's intention: if in thought we were to remove the clause "*et après un an pour celles faites à l'étranger*," the meaning of the rule might then be that for foreign consignments the period of prescription was to be the ordinary 30 years or none at all. The character of the rule would remain the same. If, however, by removing the clause in question the rule comes to mean, "the prescriptive period in connexion "with consignments is half-a-year: this relates to home con-"signments; foreign consignments depend on foreign law," —then the character of the rule would be altered: the spatial reference would no longer be part of the contents of the rule but would belong to an independent rule. We should no longer have a French ordinance defining the prescriptive period in one way for home and in another way for foreign consignments: but we should have a single general rule on the matter, and by its side would be another stating the view of the French lawyer as to the ambit of its effectiveness in space. When, then, we are referred to a foreign law which contains a space-reference, we must always inquire whether the space-reference belongs to the content or to the extent

of the law: if it belongs to the content, we are bound by it just as by the rest of the law; if it belongs to the extent, it does not concern us, for we are only referred to the material part of the law, and the question of its effect in regard of foreign legal areas has been settled, for us, by our own lawgiver.

Renvoi, continues Kahn, is in all circumstances excluded: it is always perverse and impossible. Suppose a German court has to deal with a consignment of goods from France to Germany under a contract made in Paris, and that the two parties to the contract and to the action are French. The contract is governed by French law in accord with the intention of the parties: and the question of prescription is to be determined by the same law, *i. e.*, by Art. 108, Cod. Civ., set out above, and the prescriptive period is a year. Let us now adopt in turn the two hypotheses mentioned before: (i) Assume that the clause "*et après un an pour celles faites à l'étranger*" is wanting and that the prescriptive period is 30 years, that of municipal French law in general. We adopt that period. (ii) Assume now that the absence of the clause in question makes the rule mean, "the prescriptive "period in connexion with consignments is half-a-year: this "relates to home consignments, foreign consignments depend "on foreign law." The claim would be prescribed in half-a-year, despite the fact that the consignment was with Germany; for, our law declares that the contract was French and that the prescriptive period is to be decided by reference to French law. The question of the *application* of the French law of prescription is settled so far as we are concerned: we only ask what that law is.

Obs. 2.—Mr. Westlake's views about the application of Renvoi in the Law of succession have an exceptional importance, because it is in the domain of succession alone that Renvoi has been accepted by English courts. It will have been noticed that in 1900 he seems to disapprove of *Weiterverweisung*,[1] and that in the cases in which he still approves

[1] Query, disapproving, therefore, of the decision in *In re Trufort* (*ante*, p. 16)?

of the results of *Rückverweisung*, it is for a reason different from that given in 1898. Thus, in the course of the oral debates of 1898 he dealt with the case of an Englishman dying domiciled *de facto* in France, leaving movables in England. The law of France where the succession is opened, says that these movables, like the rest of the movable succession, are to be governed by the law of the deceased's domicil *de jure*, *i. e.*, by the law of his nationality, while the LNat. (England) would apply the law of the last domicil *de facto*. Why, asked Mr. Westlake, should the English court, when dealing with the movables in England, refuse this Renvoi? If, said he, the English law has resolved to apply the law of the domicil *de facto* to movable successions, it is in order not to defeat the lawful expectations of the deceased and his relatives, a reason which necessitates the conception of the movable succession as a unit: were the English court to apply the French internal law and not French law in its totality, there would be a breach in the unity of this succession so far as the goods in England are concerned (*Annuaire*, 1898, p. 218). In 1900 Mr. Westlake would approve of the application of internal English law to this succession on a different ground, namely; that the French law (of the *de facto* domicil) to which the English courts were, at first, desirous of remitting the case, does not in fact exist, owing to differences in English and French theory.[1]

A few words may not be out of place with regard to the "Unity" argument. When it was admitted universally that LDom. regulated movable successions, unity of treatment prevailed: if the day ever returns when all States again

[1] Since these lines were written, the writer has had to consider this very case. The question arose whether an English lady, who had died domiciled *de facto* in France, could bequeath all her movables in England and in France to some of her children in exclusion of the others. When French experts were consulted by her English solicitors with regard to the French law, the answer came back that the French law would apply itself (including its rules as to legitim) *if the English law as LNat. would deem French law applicable.* If to this situation we apply either the solution of 1898 or that of 1900, we have each system saying, "After you, sir," to the other, and no progress made.

adopt the same criterion, that unity will again prevail: meanwhile the position is that, while an approach towards unity is possible by means of compromise, complete unity is impossible save by surrender. Renvoi is a specious device, demonstrably unsound in theory, for cloaking surrender: that this is so, may be seen, if, still employing Mr. Westlake's illustration of 1898, we consider the following cases:—

(a) With regard to goods in England: Eng. LFor. → Fr. LDom. (*de facto*) → Eng. LNat. (or Dom. *de jure*).

(b) With regard to goods in Denmark: Dan. LFor. → Fr. LDom. (*de facto*) → Eng. LNat.

If the English courts in (a) or the Danish courts in (b) allow the French courts to refer them to the English law, they are surrendering their criterion of domicil to that of nationality—a surrender which it would be naïve to demand on grounds of unity of treatment, when one remembers that the English and the Danish law remain loyal to a criterion which aforetime produced the desired unity until the intruding French criterion destroyed it. Renvoi being, then, detected and discredited and repudiated, and surrender being assumed impossible, the question arises whether the English judge should make an approach to unity by means of compromise: von Bar (*see* p. 44, *ante*) and Mr. Westlake in 1898 (*see* (2), p. 58, *ante*) furnish a case where compromise might seem reasonable: it is the case in which both LDom. and LNat. agree that LNat. is to be applied, *e.g.* (as regards movable succession), Eng. LFor. → Germ. LDom. → Ital. LNat. As the Italian law declares itself competent to deal with this case, unity of treatment is secured if the English courts, in view of the altered international situation, allow the requisite modification of their criterion. Such modification is, *pro tanto*, surrender; but, being made in the expectation that, *mutatis mutandis*, the Italian courts would act likewise,[1] it would be more aptly called compromise.

[1] The compromise would involve, *mutatis mutandis*, the following: Ital. LFor. → Denm. LNat. → Eng. LDom.

Mr. Westlake's doctrine of 1900 is, obviously, based on principles which do not tend to unity of treatment in matters of succession. It seems to amount to this. When first LDom. was accepted as the law governing movable successions, it was operative among a number of States all of whom accepted the principle, and nowhere did or could the principle mean that State A applied the law of State B in cases where State B would apply some other law than its own : now-a-days, however, not all States regulate succession by reference to LDom., a large number adopting LNat. instead: the universal family has become two international groups. Yet, as in the beginning so now, it is only within each group of consentients that one State can apply another's law ; rather than apply the law of a State belonging to the other group it will apply its own, the *lex fori*. Flawless in logic as this doctrine may be, it is doubtful whether an English judge will consent so to whittle-down English doctrines of I.P.L. The comity which initially directs the English judge to apply (say) the law of France is a reasoned comity: the comity may seem to be declined, but the reasoning remains. And if, relying on this reasoning, the English judge should defy the paradox[1] involved in applying a law which does not wish to be applied, he will be on the side of unity of treatment in matters of succession ; for he will be saying, "It is better that a succession "should be regulated *either* by LDom. or by LNat.—these "two and no more—than by the law of every forum before

[1] As to this, *see* p. 96 *et seq.*, *post*. *Cf.* also the remarks of M. Streit (*Annuaire*, 1900, p. 162): "It is urged by advocates of the Renvoi-theory that the question is due to the existence of a legal lacuna and that it implies a negative conflict, a conflict of abdications, between two systems. But if there was only a lacuna, only a negative conflict, no question of Renvoi could arise. There must exist also a *positive* conflict, a conflict bred from the fact that each of the two legislations which are brought face to face orders its judges to apply the foreign law, in accordance with the rules of competence adopted by the native forum. But, says an objector, this means that one legislation is imposing on the other a competence which the other refuses; what business, it is ejaculated, has one legislator to regulate the competence of another! The reply is that this is a regrettable but none the less inevitable consequence of the fact that there is not at present one uniform system of Private International Law recognised by all States. Unless the law-maker is content to leave his judge without any directions, the law-maker is bound to regulate the competence of foreign tribunals according to the principles which he has deemed it proper to apply to the competence of his own rules."

" which it may be brought." And it is obvious how consistent this would be with the compromise just suggested for the case in which LDom. and LNat. concur in approving the application of LNat.

Obs. 3.—In further elucidation of Mr. Westlake's doctrine, it will be well, in conclusion, to refer to another illustration used by him in the course of the oral discussion of 1900 (*Annuaire*, p. 166). Let us take, said he, the question of the capacity of an Englishman domiciled in France. French law, as is well known, desires to grant admission to the English law as LNat. But the English law-maker has not laid down any rule as to the status and capacity of persons domiciled out of England, be they Englishmen or foreigners. What is the French judge to do? He may not refuse a decision. He will, accordingly, apply the law of the domicil. In the absence of nationality, domicil is none the less an available bond, even though, according to modern ideas, a bond less strong than nationality. The reason, continues Mr. Westlake, why the French judge will apply French law is, not because the English law-maker refers the matter to him, but because the English law-maker pronounces the matter outside his interest. *La loi anglaise ne renvoie pas; elle ne fait que se désintéresser.* Side by side with the primary legislative competence of the law of the nationality, there is a secondary legislative competence of LFor. to deal with the case where no other exists.

This illustration is, of course, of primary importance only in the general discussion of Renvoi, for the troubles of a French judge have no direct bearing upon English law and law-making. It is, however, interesting as an ingenious defence by Mr. Westlake of certain recent decisions of French courts. Assuming for a moment that it is permissible to discuss the attitude of a French judge *vis-à-vis* with his own law, it might be suggested that the following mode of reasoning would have been at least equally justifiable: " I, a French judge, am bidden to apply in the case of this Englishman his national law. I find that there does not

exist a law of the English, *sensu Gallico*; but I find a law of the English, *sensu Anglicano*. I find also that English, *sensu Gallico*, and English, *sensu Anglicano*, are practically identical groups: indeed, from the standpoint of rough sociological generalisation, which is the standpoint from which my lawgiver has developed the rule that questions of capacity are to be referred to the person's national law, the groups are identical. I obey my lawgiver—*cy près:* I apply the internal law of England to the status of this Englishman.[1] His place of domicil is not one of the factors which I am bidden to take into account."

Would an English judge in like case, *e.g.*, when pronouncing on the marriage-capacity of an Englishman domiciled in France, and bidden by his law to apply LDom., be guilty of even a technical outrage if he were to say, "The law pre- "vailing in the place of this person's domicil is the Code "Civil; that it defines its justiciables in term of nationality "and not in terms of domicil, does not make it any the "less the law of the place of his domicil. That is the "territorial law which, without any regard of persons,[2] I am "bidden to apply and I borrow for the purpose in hand the "provisions of the French Code with regard to marriage- "capacity."

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[1] As a matter of fact, the French courts say this whenever, *e.g.*, in a case of movable succession, they adopt Renvoi in the following circumstances, Fr. LFor. → Eng. LNat. → Fr. LDom. (*de facto*).

[2] *Cf.* M. Weiss (*Annuaire*, 1901, p. 151), "La question du Renvoi est née du choc du vieux principe territorial avec le nouveau principe, Français et Italien, de la personnalité de la loi."

VI.

28. The principle of Renvoi has received a certain amount of recognition in legislation and in international congresses:

(i) In 1854 a kindred principle, but limited in extent and more scientifically stated, was adopted by the Canton of Zurich. The personal status, family law, and movable successions of foreigners were declared to be governed by their LNat. *so far as their LNat. prescribed.* A similar rule was adopted in the Canton of Zug in 1861 and in Canton Grisons, 1862.

(ii) The Swiss Federal law of December 27th, 1874, contained certain articles which have been considered by some (*e. g.*, by Bartin, *Revue de Dr. Int.*, Vol. XXX, p. 179) to accept the Renvoi-principle. They are as follows:—

Art. 37. Si le futur époux est étranger, le mariage ne peut être célébré (en Suisse) que sur présentation d'une déclaration de l'autorité étrangère compétente, constatant que le mariage sera reconnu par elle avec toutes ses suites légales.

Art. 56, dealing with marriages between foreigners says, "Qu'aucune action en divorce ou en nullité ne peut être admise par les tribunaux (Suisses) s'il n'est pas établi que l'État dont les époux sont ressortissants reconnaîtra le jugement qui sera prononcé."

(iii) In 1893 and 1894 a congress, representative of nearly all systems of law except the Anglo-American, was held at The Hague which dealt, among other international topics, with that of marriage. In the latter year the following resolution was adopted, which may perhaps be considered as a Renvoi-rule:—

Le droit de contracter mariage est réglé par la loi de chacun des futurs époux sauf à tenir compte, soit de la loi du domicile, soit de la loi du lieu de célébration, si la loi nationale le permet.

(iv) A Hungarian law of 18th December, 1894, lays down (Art. 108) that marriages contracted out of Hungary are to be governed, save in certain excepted respects, by the national

law of both parties unless that law prescribes the application of some other law. Art. III extends this to marriages of foreigners in Hungary. (Neumann, *I.P.R. Materialien*, No. 349.)

(v) In August 1895, at the close of the session of the Institute of International law, held at Cambridge, it was decided to place upon the list of topics for future discussion "The conflicts between legal systems with regard to I.P.L." A committee was ordered to report on the matter. In 1896, at the session of Venice, the question was propounded by the Reporters of the Committee (Buzzati, Lainé) in the following form: *Quand un législateur abandonne à une loi étrangère la détermination d'un point de droit, demande-t-il à cette loi de décider quelle loi sera applicable, ou cherche-t-il directement dans cette loi quelle solution doit recevoir le point de droit douteux?* This mode of stating the question provoked criticism, and no progress was made either in that year or in the next. In 1898, at the session of The Hague, the Reporters of the Committee presented a reasoned report which concluded by proposing certain articles for adoption by the Institute. These proposals were discussed but no definite determination was arrived at, and the matter was adjourned. At the next session of the Institute, in 1900, held at Neuchâtel, the Reporters submitted three articles, in somewhat different form from those of 1898. In the course of a protracted debate two of these articles were dropped: the one remaining ran as follows: *Lorsqu'un législateur, posant une règle de droit international privé, désigne comme directement applicable par ses tribunaux à une certaine matière une loi civile étrangère, il ne doit pas subordonner l'application de cette loi à la condition qu'elle soit prescrite également par la législation étrangère dont fait partie la loi civile ainsi désignée.* In order to ascertain the decision of the Institute a vote was first taken on the proposal to affirm the principle of this article: it was affirmed by 21 votes to 6.[1] Later, the article itself was accepted by

[1] *For:* Messrs. Asser, Boiceau, Buzzati, Catellani, Corsi, Descamps, Dupuis, Fauchille, Hilty, Holland, Kebedgy, Lehr, de Liszt, Lyon Caen, Midosi, Renault, Rostworowski, de Roszkowski, Sacerdoti, Streit, Vesnitch. *Against:* von Bar, Brusa, Harburger, Roguin, Weiss, Westlake.

17 votes to 7, subject to such textual emendation as might subsequently be agreed on without discussion; and ultimately the Institute adopted, almost unanimously, the following resolution: *Quand la loi d'un Etat règle un conflit de lois en matière de droit privé, il est désirable qu'elle désigne la disposition même qui doit être appliquée à chaque espèce et non la disposition étrangère sur le conflit dont il s'agit.* The result of the battle royal was, therefore, adverse to the advocates of the Renvoi-theory; but the minority contains names of exceptional weight.

(vi) In 1898 a Japanese law was issued, called "Ho-rei," containing general rules for the application of laws. Art. 29 is as follows:—"When a person's national law is declared applicable and according to the law of his country the laws of Japan ought to be applied to him, the latter are to be applied." This is a statutory recognition of *Rückverweisung* in certain cases.

(vii) The new German Civil Code contains a very similar provision in Art. 27 of the *Einführungsgesetz*. The substance of that article is this: in the cases named in certain preceding Articles as cases in which a foreign law is applicable, the German law is to apply if it is declared applicable by the foreign law in question. The Articles named refer to legal capacity, Art. 7 (1); marriages where one only of the parties is a German and marriages in Germany where both parties are foreigners, Art. 13 (1); cases in which the proprietary relations of husband and wife are to be governed by the law of the State to which the husband belonged at the time of the marriage, Art. 15 (2); Divorce, Art. 17 (1); Succession to deceased foreigners, Art. 25.

The motives which accompanied the first draft of the rules of I.P.L., now partly embodied in the *Einführungsgesetz*, have not been published. They were the result of official conferences of the Bundesrat. The Project of Gebhard, the *Redaktor* of the "General part" of the *Bürgerliches Gesetzbuch*, was however that which was ultimately adopted, as set

out above, by the Bundesrat, and we know what his *Motive* were.[1] His general Project was clearly and distinctly opposed to the idea that a foreign law is only to be applied where it wishes to apply. "It is recognised," says the general Project, "that legal relations, by reason of their international character, may belong to foreign countries as well as to our own, and it is not only allowed but it is ordered that, in judging a legal relation which belongs to a foreign country, the foreign law shall be applied. . . . . This foreign law is applied not because it desires to be, but because our municipal law declares that it is applicable."[2] It was admitted by Gebhard that the principle which was ultimately adopted in *Einf. Ges.*, Art. 27, is an inroad on this principle, and the inroad was justified on two grounds: (*a*) that it would diminish the number of conflicts of law, and (*b*) that the area of application of German law would be extended, with a steadying effect, in Germany, as regards the security of jural relations.[3]

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[1] See Meili, *Hist. and Syst. of I.P.L.*, 1892; Niemeyer, *Vorschläge und Materialien*, etc., 1895.

[2] Following out this principle, the First Commission rejected that limited recognition of Renvoi which finally prevailed.

[3] See criticism of these doctrines by Bartin, *Rev. de Dr. Int.*, Vol. XXX, p. 167, *et seq.*, and by Kahn, in Jhering's *Jahrbuch*, Vol. XXXVI, p. 366, *et seq.*, where the history of the legislation is given. See also Keidel's Art. in Clunet's *Journal*, 1901.

It is interesting to note that the question has been raised and is still under discussion in Germany, whether Renvoi may be accepted by German courts in other cases than those enumerated in Art. 27 above named.

At the meeting of the Institute in 1898, Herr Sieveking, one of the persons who took part in framing the new German Code, expressed an opinion that *Einf. Ges.*, Art. 27, was not to be considered as an acceptance of the Renvoi-theory, but as a partial acceptance on practical grounds of some of its results.

VII.

29. To an English lawyer dealing hereafter with any matter in which it is possible to apply the Renvoi-theory, two questions will present themselves: (i) Whether, in the absence of legislation on the subject, English case-law is favourable or unfavourable to the application of the theory; and (ii), in case of doubt, whether the theory is one which commends itself on its merits and which it is desirable to accept when opportunity offers.

It is with the second of these questions that this pamphlet has so far been mainly occupied, and nothing more than a few words of summary is needed as regards it. The reader will have perceived that quite apart from *Weiterverweisung* the (so-called) Renvoi *(Rückverweisung)* takes two different shapes; Renvoi (proper) implies that the law of A refers a given jural matter to the law of B, and that the law of B, *being thus seised of the case*, sends the matter back to the law of A. The crudity of the theory in this shape has been clearly shown in the foregoing pages. It suffices, perhaps, to say "Lawn-tennis." In the other shape of the theory, that of Westlake, von Bar and others, we have not lawn-tennis, because the player in hand has served a fault—or, better, because the other player refuses to play: the law of A has referred to the law of B, but the law of B, having different "international" principles from those of A, declines the reference: there is a *désistement* on the part of B, and A must find some other method of dealing with the question. This means that A must apply the *lex fori*. The theory in this shape is at least scientific: but it makes the dissonances which have created the need for International law the reason for denying its existence. Instead, as regards the personal statute, of a *jus gentium*, the theoretically universal character of which the English courts

have repeatedly vindicated in the assertion that "no man shall be without a domicil," there would be merely a *jus inter quasdam gentes*. Every fresh defection from the ranks of those States which accept LDom. as the criterion of the personal statute would curtail, for England, the area of I.P.L.: indeed, it would only be possible with a reserve to speak any more of the Anglo-American body of international rules concerning the personal statute, for English and American courts take different lines with regard to the resumption of the domicil of origin consequent on an abandonment of a domicil of choice.[1] Surely, if our traditional rules be based on any considerations of private justice, in addition to public comity, it is impossible to admit such an exaltation of the LFor. at their expense. Further, the Renvoi theory, stated in terms of *désistement*, takes a positively anti-social shape in certain cases and is obnoxious to much of the criticism devoted by Schnell and von Bar to the traditional theory. In illustration of this we may imagine the English courts applying internal English law to determine the validity of the marriage of a Dane domiciled in France, or to regulate a succession such as that with which *In re Trufort* was concerned.

Again, the *désistement* theory throws upon a local judge the burden of saying whether a foreign system is proved to "desist" or no—nay, more, it throws this burden on all professional advisers and lay persons who wish to know by what law to regulate their conduct. What a serious burden this may be is evident, when one considers the diverse views obtaining in France as to whether French law recognises domicil *de facto*, or when one considers such cases as the following. Let us suppose that a person, originally of German nationality, has settled in Italy and through non-compliance with German rules as to registration has lost his original nationality without acquiring a new one: to what

[1] "The great current of American authority lays down the principle without qualification that a domicil once acquired by one *sui juris* is retained, even after abandonment, until another is acquired *animo et facto*." (Minor on *Conflict of Laws*, 1901, p. 125.) In England, as is well known, the domicil of origin would be deemed to be resumed.

law is an English court or practitioner or private party, supposing the principle of *désistement* to be admitted, to refer in order to ascertain this person's capacity? Does Italian law, which desisted so long as German law deemed him a German, desist from desisting the moment that German nationality has, by German law, been lost? If so, in what quality does it deem itself applicable?[1] as LDom. or as LFor.? and if it be as LFor. —*i. e.*, on the ground of a *désistement* by the German law—that an Italian tribunal would now apply Italian law, is the English court to consider this a *désistement* on the part of Italian law *as LDom.* or not?

Further, Mr. Westlake himself shows how difficult it is to say whether a State "desists": dealing in 1900 (*Annuaire*, p. 166) with the case where a French judge has to pronounce on the capacity of an Englishman domiciled in France, he says, "Il appliquera donc la loi du domicile: à défaut de la nationalité, le domicile n'en est pas moins un lien:" and again (p. 39), dealing with the case where an English judge has to pronounce on the marriage-capacity of an Englishman domiciled in France, he allows him to apply English law on the ground that "il est impossible de nier que son pays ne soit intéressé à la question par la nationalité." If a State which adopts domicil as the exclusive criterion of the personal statute can be imagined to fall back on nationality in order to justify the application of its law to a given case, and if a State which adopts nationality as its criterion can similarly fall back on domicil, even an expert would find it difficult to frame his affidavit as to *désistement*, while the wayfaring man, without being a fool, might easily err in such a labyrinth.

The writer ventures to express the opinion that the Renvoi-theory in its crude shape is not one which a lawgiver

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[1] Note that the German law would still hold itself applicable. *Einf. Gesetz.*, Art. 29, says, "When the law of the State to which a person belongs, is declared herein to be "applicable to his legal relations, but he belongs to no State, the law of the State to which "he last belonged is applicable, and, if there is no such State, then the law of the State in "which he is domiciled and, in default thereof, the law of the State in which he resides or "resided at the time in question." It is easy to see that this section might give rise to nice problems in *désistement*.

would accept upon its merits, even when creating a system *de novo*, and that it is not in either of its shapes a desirable importation into a system which has already been settled upon other lines. That the English system has been already settled on other—even if less scientific—lines is, in the opinion of the writer, the answer to the former of the two questions propounded at the head of this section (VII).

30. It is to be remarked that English law knows nothing of the Renvoi-theory, just as until yesterday it had never heard of the Renvoi-question. In a handful of cases, most of them gathered from one small corner of the law alone, decisions have been rendered in the English courts which are congruent with the Renvoi-theory in the less scientific of the two shapes adverted to in the preceding paragraph; but that is all. And just as English law has never consciously accepted the theory as a whole, so it has never in terms repudiated it; the writer believes, however, that its fundamental principles are hostile to the theory, and the demonstration of this is the task which he essays in the immediately following pages, premising and confessing that, here as elsewhere, when the attempt is made to formulate in a system a mass of English case-law, some constructive imagination and also some eclectic manipulation are occasionally called for, which depend for their justification on the character of the finished product as a convincing and consistent whole.

The following propositions represent, in the writer's opinion, the basal doctrines of I.P.L. as applied in England, so far as the Renvoi-question in general is concerned, omitting for the present moment the dozen cases which specially relate thereto:—

(1) The "western" legal world consists of a number of individual systems each occupying a definite seat in space. This is an outcome of territorial sovereignty. Each of these systems can be stated in terms which contain no reference to the existence of other systems. Such law is strictly internal, municipal, local law.

(2) Each system recognises certain rules of external conduct due to the fact that it exists not only individually but as one of a society of systems. These rules are "international" law, and were originally received *ab extra* as part of a system conceived to exist universally. But now-a-days they are necessarily formulated by each State for its own guidance.

(3) The "International" rules lay down the occasions on which the given system applies not its own but another's law. They are not capricious, but are based on considerations of jural propriety—either on considerations of comity or on considerations of the interests of the persons affected: if on considerations of comity, then the comity is towards the society of legal systems and not towards any individual system (for the rules are stated in general terms).

(4) The "international" rules are—at any rate, normally—framed in terms of legal space, the *indicium* of an occasion on which the "international" system (or the "international" part of a system) is to operate, being the presence in a foreign legal-area of some fact which is deemed to be of such a character and to be so connected with the soil or its sovereign as to demand or justify the application of the law of that legal area in the given case (*e.g.*, *lex loci domicilii*, *lex loci actus*, *lex loci contractus*).

(5) When the English law, under the guidance of its rules of I.P.L., decides that an occasion for the operation of a foreign law has arisen, the selection of the particular foreign law is implied, *and no further considerations, dependent on the co-existence of different systems in legal space, can be entertained:* the reference is, therefore, to the purely internal law of the foreign legal-area. Considerations based on nationality are, for the purposes of civil law, spatial considerations.

(6) The "international" rules of any system are distinct from its internal law, whether the two be conceived of as separate systems or as separate parts of the same system.

(7) When it is said that a foreign law is "referred to," or is "applied," or that the matter is "subject to" a foreign law, etc., that foreign law is proved and admitted as fact and not as law: territorial sovereignty demands this. The English law does not profess to abdicate in favour of the foreign law, or to decide on the legal problem exactly as the judge of the foreign legal-area in question would decide. This would, indeed, be impossible in those cases where differing elements in a given legal situation are referred to different foreign systems.

These propositions contain a doctrine familiar to the international lawyer: it is not claimed that the doctrine is theoretically sound, but only that it is coherent and intelligible. The reader who prefers to take them for granted is recommended to pass at once to p. 108; the intervening pages are but an amplification of the preceding summary. From page 108 onwards to the end of the pamphlet, the writer shows that the English cases which seem to support Renvoi do not necessarily demand more than the further proposition:—

(8) The following exceptions have been engrafted on the principle of proposition 5, *supra*:—(i) When the testamentary formalities of English law are declared adequate by the foreign law to which the English rules of I.P.L. refer the question, a will in English form will be admitted to probate in England. (ii) When a foreign law which, under the English rules of I.P.L., is the law to which a movable succession belongs, refers the regulation of that succession to a third law and the third law accepts the reference, there is authority for

saying that the English courts will apply that third law to the succession in question.

At the same time the writer suggests that the cases referred to in proposition (8), while an inadequate basis for the general reception of Renvoi by English courts, demonstrate a willingness on the part of English law so to enforce its rules of I.P.L. as not to infringe rights duly acquired under competent foreign systems, an attitude which weakens those claims of the Renvoi-theory which depend on considerations of practical justice.

31. In the phrase "law of England" the word "England" has the same sense as in the phrases "king of England," "climate of England," and refers to a definite area in space. There may be other areas possessing each a law, and there may be jural relations other than those created and regulated by the law of England; but the law of England can be stated without any reference thereto. The legal system which has its seat in that ultimate spatial unit called England, may or may not have seisin of all persons, things, acts and events in England—this does not enter into the conception and is only important in that, so far as it has not that seisin, the phrase "law of England" tends to become a misnomer for the system. As a matter of work-a-day fact, however, law in England and the law of England are coincident or may be deemed coincident, with as much exactitude as can be hoped for in one of the sciences of life. Any exceptions to this statement are due to the fact, to be hereafter explained, that the English courts sometimes recognise another law than this strictly territorial law of England.

Let us take an example or two. We may say with perfect propriety that divorce is an institution of the law of England, and we mean thereby that, *where and in so far as the law "of England" applies*, divorce can be obtained if prescribed conditions be complied with (*e.g.*, the condition that the spouses are permanently settled in

England at the time of the suit). We may say also that primogeniture is an institution of the law of England, and we mean thereby that, *where and in so far as the law "of England" applies*, the eldest lawfully-born son is preferred to others in the succession to the land of a deceased father. And, similarly, when we say, that by the law "of England," unlike the law "of Scotland," a debtor can give goods to his creditor by way of security without transfer of possession, we mean that he can do so, *where and in so far as the law "of England" applies.* This wearisome qualification "where and in so far as the law of England applies" does not, however, explicitly occur in our statement of the contents of the law of England; it is implicit in the very phrase "law" of England: a law that has no application is not a law. And when therefore (to take a last example) we are asked "What is the age of majority by the law of England," and we reply "Twenty-one," both question and answer contain the *sous-entendu* "where and in so far as the law of England applies," and not only is there no need to frame our reply "Twenty-one, except for persons domiciled elsewhere," but this reply would be an inaccurate statement of the law, in its isolated individuality, of "England" (as a spatial unit).

There are, however, other legal systems than that of England; and, as before, it is equally important for us to realise that the bulk of them are similarly territorial systems. We construct our legal atlas, in the main, upon the basis of the political atlas; the patch coloured green is the area of a law called hence the "law of Scotland"; the blue patch is the seat of the law of France; the yellow patch that of the law of Holland. Some areas which need only one colour in the political atlas become a number of separate areas in the legal atlas: thus each of the States of the United States of America requires a separate colour. There is a law which has its seat in Ohio, another law of Pennsylvania, and so on. In other cases, *e.g.*, in that of Germany, the colourist has to devise a scheme whereby to suggest that, while the

political unit is for some purposes also a legal unit, it is for other purposes split up into areas each of which has its own law. There is a law of Germany, but the law of Saxony and the law of Prussia are not yet entirely absorbed therein.

This territoriality of legal system is the outcome of the territoriality of political sovereignty—either the direct outcome, as in such cases as the law of Italy, the law of France, —or the indirect outcome as in such cases as the law of Cape Colony, the law of Massachusetts, the law of England. Where there is no foundation of territorial sovereignty for the legal system, it takes the shape of a personal law, *e.g.*, the law of the Hindus, and much of the law administered in Egypt and in consular courts. These are ,however, abnormal cases.

In order to complete our view of the *cosmos* of civil law, it is now to be remarked that the territorial bodies of law of which we have been speaking, are more than a number of separate systems, they form a society. None of them lives unto itself. Each of them is affected—*not in contents but in conduct*—by external claims which are due to the fact that, in the social and economic life of the individual, interests arise, from time to time, which lie across the boundaries marked out by legal geography. Occasions arise when this or that legal system deems it right to supersede, wholly or in part, its own rules by those of another system. The systematisation of these acts of sacrifice creates, for each system, a body of rules to which the convenient label of "Private International Law" has been given.

32. To help us in the analysis of the obligation and rules just spoken of, let us suppose that the following cases come up for legal appreciation in England and, though it is not essential, we will for simplicity's sake assume that they come before a court of law.

(*a*) Two subjects of Portugal, in which country both were permanently settled, intermarried in England. They were first cousins.

(*b*) A will, made in holograph form in France, by an Italian subject who was permanently settled in Scotland, purported to give all the deceased's property, which included stock in the English funds, to the deceased's widow in exclusion of his children.

(*c*) A contract was made in London whereby an Algerian merchant undertook to deliver on a day named a certain amount of esparto grass to a British merchant. He was prevented from doing this by the outbreak of an insurrection in Algeria—a sufficient reason to excuse him according to the (French) law of Algeria but not according to the law of England.

In case (*a*) the law of England might have said, "I have no objection to the intermarriage of first cousins, and the marriage is therefore good so far as I am concerned." That attitude, however, is impossibly anti-social and, in the issue, English law, even in the absence of a judgment by the Portuguese courts, substitutes the material provisions of the law of Portugal for its own and treats the marriage as invalid—even to the extent of saying that the offspring of the union cannot inherit land in England. This conduct of the law of England used to be explained by attributing it to comity. To whom? To Portugal? Or to the society of legal systems? A consideration of case (*b*) will help us to the answer.

In case (*b*), as in case (*a*), the law of England might have said: "*Quoad* form, I only know that which is prescribed by the Wills Act: *quoad* capacity, it is nothing to me that the law of Italy allows a will to be made at 18; and I am equally indifferent to the law of France: *quoad* disinheritance of children, I allow it, and the law of Scotland to the contrary is—not the law for England." As a matter of fact, however, no such course of conduct is adopted, but all the three matters adverted to are treated in England as settled in the manner in which the (territorial[1]) law of Scotland would

[1] Even in *Bremer* v. *Freeman* it is the formalities deemed sufficient by the "municipal" law of France which the court enquires for.

settle them. If this be on the ground of comity to Scotland, *i. e.*, of comity apart from principle, it would be open to the charge of being a want of comity towards France and Italy. The comity which is manifested is, then, a comity towards the society to which the law of England belongs, *Comitas gentium.* Case (*c*) makes this even clearer.

In case (*c*) English law proceeds on the general principle that a contract is to be construed and governed by reference to the law of the place to which on the whole it belongs. This place it might well decide to be England, and we will suppose that it so decides. This ultimate application of English law can hardly be treated as an act of comity to England!

What, now, do we mean by this comity thus displayed by an individual system towards the society to which the individual belongs? something optional in a given case or something obligatory in general? We should certainly be inclined to return as an answer that a gentleman is courteous because he always ought to be, and not because, in the particular case, he prefers to be. It will be better, however, to derive our answer from the following considerations.

33. The cases in which the law of England submits to receive *ab extra* limitations upon the operation of its rules, are general and not specific cases: that is to say, it generalises the concessions which it makes. It admits, for example, that movable successions are to be regulated by reference to the law of the place where the deceased was (or is to be deemed to have been) permanently settled at his death. This is a rule of conduct for the law of England. Now, when we say that the law of England admits this rule, we cannot but imply that it admits also the propriety of the rule. Historically, the rule was borrowed by administrators of the law of England from continental jurists as part of a recognised external system of I.P.L.[1] The existence, however, of an external

[1] "On the subject of domicil there is so little to be found in our own law that we are obliged to resort to the writings of foreign jurists for the decision of most of the questions that arise concerning it." *Per* Sir Thomas Plumer, V.-C., in *Potinger* v. *Wightman* (1817, 3 Mer., p. 79).

body of I.P.L. binding on all civilised systems of law has, in later days, been decisively repudiated by English courts,[1] and the continued acceptance of the rule of conduct in question (as to movable successions) must be based upon a perception of its merits as an abstractly just rule, or at least upon a recognition that the rule is not sufficiently objectionable to justify a breach of continuity in legal action. Taking this case as typical, we reach, then, the conclusion that the law of England, as one of the society of territorial systems of law, in submitting to rules which limit its proper activities, does so on principle and not on caprice. Is it necessary to go any further and say that it submits to rules which on the whole it thinks it ought to because it thinks it courteous? This is the way in which the question about comity seems best answered.

Such cases as case (*c*) above show that, in addition to *comitas gentium*, justice to private individuals is one of the bases of the international system received in England.

34. In the preceding paragraphs the rules of conduct thus recognised by the law of England have been treated as quite distinct from the territorial law of England. In justification of this mode of treatment, it is submitted that between the territorial law "of England" and the "international law of England," there is a cleavage, historical and fundamental, of a character which precludes their being advantageously conceived as parts of the same system, even if administered in the same courts.[2] The latter rules (*a*) were introduced into

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[1] "The phrase Private International law is liable to be misunderstood. It is a convenient expression for such rules as in the jurisprudence of most civilised nations are applied *ex comitate* to the solution of questions depending on foreign status, foreign laws, or foreign contracts. But no law, binding *proprio vigore* upon any independent State, can be established by generalisation from the jurisprudence of other nations." *Per* Selborne, L.C., in L. R., 10 App. Cas., p. 513.

[2] *Cf.* Jitta, in *Archiv für öffentliches Recht*, Vol. 14, pp. 308–9:—"Suppose a contract made in Germany between two Germans domiciled in Germany, and that the object of the contract and the place of performance are in Germany. This is a relation purely of national law. Now suppose that the validity, contents, and operation of this contract come before a Dutch court, as may well be the case in (say) bankruptcy proceedings. For the Dutch judge the relation is no longer a national but an international one. What is altered? No single element of the relation. What is altered is the standpoint of the observer . . . . A relation

England, as universal rules, on the authority of Italians, Dutchmen, Frenchmen, &c., whose authority in a matter of municipal English law would be *nil*; (*b*) they relate to the conduct of English law, not only or mainly towards its justiciables, but also towards external legal equals. Thus much may be pardoned as a justification of the use of the old phrase, "Private International Law."

35. Let us turn for a moment to the alternative theories. According to one of them, all rules acted on in an English (French, Italian, etc.) court are rules of municipal English (French, Italian, etc.) law. The law of England (France, Italy, etc.) consists, so it is sometimes said, of two great departments, the one being the internal law, and the other its rules of competence. The plea set out in the preceding paragraph is the only material plea which can be urged against this doctrine; but, in addition—though the matter is but verbal—it may be pointed out that when the phrase "law of England" (France, Italy, etc.) has to do the double duty which the theory requires, a confusion is created which is certainly inconvenient and inelegant, and which may be dangerous. The inconvenience and the inelegance are that

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can then be national or international, according as it falls to be dealt with in accordance with the legal claims of the narrower or wider community."

Such a law as Lord Kingsdown's Act may show that it is difficult to draw the dividing-line between internal and international law, but the broad distinction remains and its existence is attested by numerous *dicta* of English judges. See, *e. g.*, the footnotes to pp. 95 and 102 herein. There are also numerous *dicta* which seem to speak of internal and international rules as welded into one, but they can be explained as meaning that the two are administered in the same courts. Thus we have a strong utterance, as follows:—

"It is all very well to say that International law is one and indivisible, of which we take judicial notice; but we cannot be ignorant of the fact that various civilised countries take different views of it; and are we to say that the Scotch Court is wrong because it takes a different view of the application of International law than that which we should take? I think not. This part of the International law as recognised by the Scotch law becomes part of the Scotch law; and, to my mind, this Court, at all events, is not at liberty to review International law so far as it becomes part of the Scotch law, and which Scotch lawyers say is Scotch law. The fact is of course notorious to us all, that if anybody studies Private International law out of a French law-book, he takes one view of it; and if he takes a German law-book he takes another view. They do not all take the same view." *Per* Lindley, L.J., in L. R. (1892, 1 Ch., p. 226).

Yet the separate existence of the two bodies of rules is implied in the passage which precedes that cited. It runs, "The court of Louisiana decided the question of title to the English ship, not by English or international law or anything of that sort, but by their own law, ... throwing over international law."

we may have to say, in this or that case, that the law of England is that the law of England does not apply. The danger is one closely connected with the subject of this pamphlet. The law of (say) England, in compliance with I.P.L., refers a certain matter (say the validity of a marriage) to the law of (say) Italy. If the phrase "law of Italy" is susceptible of meaning both the internal, territorial law of Italy and also this law *plus* the Italian rules of I.P.L., it is, at any rate verbally, possible to allege that the reference made by the English law is to the law of Italy in this latter sense, *i. e.*, in its totality. Reasons will shortly be given, however, to show that the law to which the English law meant to make the reference was the territorial law of Italy. It is the possibility of this confusion which constitutes the danger mentioned above.

36. The theory examined in the preceding paragraph may breed confusion; that which next comes before us may breed confusion worse confounded. According to this theory[1] the territorial law of (say) England and the rules of I.P.L. to which the activities of that law are subject, are so wedded that the territorial law cannot be stated except in terms of its rules of competence. Thus, to say that, by the law of England, testamentary capacity *quoad mobilia* is acquired at 21, is, according to this theory, inaccurate and meaningless: the proper statement should be "By the law of England "testamentary capacity *quoad mobilia* is acquired at 21 *in* "*the case of persons domiciled in England.*" Similarly, when the Italian Code (Art. 763) declares those persons to be incapable of will-making who have not completed their eighteenth year, it is insisted that the true statement of the law of Italy would be "*Political subjects of Italy* are incapable of testa- "tion unless they have completed their eighteenth year"; and, in the corresponding provision of the French Code, the advocates of this theory would mentally interpolate the

[1] At the Hague in 1900 Mr. Westlake based his acceptance of the Renvoi-theory upon, in part, the doctrine here stated. *See* pp. 59–60, *ante.*

phrase " Political subjects of France and other persons who, " with governmental authorisation, have established a domi- " cil in France." These amplified propositions are perfectly, and insidiously, correct; there is no canon of either verbal or material logic which defines the stage at which a rule should be so stated as to incorporate the exceptions. The insidious character of this doctrine will be more easily shown by the following analogy.

Let us imagine a number of material bodies, revolving in separate orbits round a central point, each under its own initial impetus: the proper course of each body is, however, let us further imagine, subject to occasional perturbations due to the attraction of the other bodies. It is clear that the motion of any one body may be stated either by reference to its proper orbit, with separate allusion to the perturbations, or in terms of the resultant orbit. Two things must be borne in mind, however: (i) that if for any purposes of calculation the proper motion, alone, has to be considered, the latter form of statement should be avoided; and (ii) that in calculating the relative positions of the bodies to each other, it will not do to apply at the same time one theory of the nature and intensity of their mutual attractions in the case of one body, and a different theory in the case of another body—a fine mess would otherwise ensue.

The application of this in the domain of international civil law is obvious: (i) The statement of internal and international law in fusion must not be taken to exclude the possibility of stating internal, territorial law in its individuality—indeed the external *lex loci domicilii*, *lex loci actus*, *lex loci contractus*, may in the vast bulk of cases be neglected. (ii) Unless great care is employed, the mode of statement in question will lead to the contemporaneous admission of conflicting laws of perturbation. The following example will illustrate that fallacy in operation: A question comes before an English court with regard to the testamentary capacity of a British subject who has died domiciled in Italy. The rules of I.P.L. received in England—and let us note in passing that *they*

have to be stated apart from the internal law — refer the matter to the law of Italy. The law of Italy, if we mean thereby the blended law of the theory under discussion, contains one rule only of testamentary capacity, and that one rule relates to Italian subjects alone. How is the English judge to extricate himself? If he thinks to do so by applying the law of England, he finds that it relates only to persons domiciled in England. The *impasse* is the analogue of the mathematical mess hinted at above and is due to the same cause, the contemporaneous application of inconsistent principles. If—as must be the case in an English forum—international law *as conceived in England* is applied, no other conception thereof is subsequently admissible. The danger, then, of stating English municipal law in terms of its International law is that we should, in the same case, and in an English forum, state the municipal law of a foreign system in terms of *its* International law, even when that International law is at variance with our own.[1]

37. More important for our present purpose than the question of the jural basis and character of the rules of effacement accepted by the law of England, is the form traditionally assumed by the more fundamental of these rules.[2] With unvarying uniformity they call attention to some fact connected with the local area of some foreign law, and declare that law to be applicable because it is the law of the area with which that fact is locally connected. Thus, when the rule in question relates to testamentary-capacity,

[1] The writer is here only restating what he conceives to be the traditional doctrine of English law. He is not attempting the impossible task of impugning the logic of the alternative doctrine.

[2] It is possible to find quite modern affirmations of the rules in their original shape. See, *e.g.*, "Unicum hoc ipsa rei natura ac necessitas invexit ut cum de statu et conditione hominum quæritur, uni solummodo Judici, et quidem Domicilii, universum in illa (*sc.* causa) jus sit attributum," Rodenburg (De stat. divers., I, iii, 4): cited with approval by Lord Westbury, in *Shaw* v. *Gould* (1868, L. R., 3 H. L., p. 83), and by Lord Watson, delivering the judgment of the Judicial Committee in *Le Mesurier* v. *Le Mesurier* (1895, A. C., p. 538). (i) C'est ainsi que *la majorité et la minorité du domicile* ont lieu *partout* même pour les biens situés ailleurs (Boullenois). (ii) Quoties in quæstione an quis minor vel majorennis sit, obtinuit id dijudicandum esse ex lege domicilii; sit ut *in loco domicilii minorennis, ubique terrarum pro tali habendus sit*, et contra. (J. Voet.) Quoted, without dissent, by Lord Halsbury, L.C., in *Cooper* v. *Cooper* (1888, L. R., 13 A. C., at p. 99).

it emphasises the fact that the testator is permanently settled in a foreign legal-area and on that ground pronounces that the law of that foreign area *(lex loci domicilii)* is the proper law to decide the question ; the implication is that there is an intimate connexion in space between the salient fact and the proper law to deal with it. This law can be no other than the territorial law of the area in which the fact, so to say, resides.[1] The rule, again, which declares that the *lex loci actus* is the law competent to determine the formalities of (say) a marriage-ceremony, suggests a similarly intimate connexion between an act on a given territory and a territorial law.

It may be added that by aid of the maxim, *Expressio unius exclusio alterius*, we may discover from these rules what facts, local to a foreign legal area, are not deemed adequate on which to found a self-denying ordinance on the part of the English law. Of these eloquent silences the most significant is that with regard to political allegiance: the fact that a given person is politically connected with the area which is the seat of a foreign legal system, is not recognised as a reason for applying to him that legal system, save in certain exceptional cases.[2] The English doctrines of I.P.L. admit, indeed, that a person can be attached to that foreign area in such a way as that the law of that area may exclude all others in determining, *e.g.*, his personal status, but that tie is the tie of Domicil and not the tie of Domicil-with-governmental-authorisation or the tie of Nationality.

38. When, then, upon any given occasion a rule of I.P.L. operates in England, the situation involves a number of elements, the sequence of which may be stated as follows:

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[1] "What is really necessary is that the father should at the time of the birth of the child be domiciled *in a country allowing legitimation.*" *Per* Cotton, L.J., in *In re Grove* (1888, L. R., 40 C. D., p. 232). This clearly refers to the territorial law of the country and not to the law which would, there, be applied in the particular case.

"The object of the law in searching for and ascertaining a man's domicil is to ascertain *the particular Municipal law* by which his private rights are regulated and defined." *Per* Chitty, J., *In re Craignish* (1892, 3 Ch., at p. 189).

[2] Note that the traditional doctrine as to domicil was received in England for use within the British confederation as well as outside, and at a time when British nationality was indelible.

1. The co-existence of a number of territorial systems of law side by side with that of England, *e. g.*, the law of France.
2. The presence upon one of the non-English legal areas of a fact, *e. g.*, domicil of AB in France.
3. The admission that the spatial connexion between the fact and the legal area is of such a character as to demand or justify the application of the law of *that* area to the whole or part of a problem calling for legal appreciation, *e. g.*, the distribution of AB's goods on his death.
4. The existence of a rule of *that* local law dealing with the class of problem in question, *i. e.*, the territorial French rules of post-mortuary distribution of goods.
5. The application by the English law to the movable succession of AB of these local rules.

The above enumeration has been made in order, at the risk of tedium, to fix the reader's attention upon the fact that before any reference is made to a foreign law there must exist a fact connected in a determinate manner with a foreign legal area. The kind of fact and the degree of connexion required are not for the foreign law to declare, for it has not yet been invoked; they are to be declared by International law as interpreted by the law of England. When the law of England is satisfied that the fact resides in the pre-determined manner upon the foreign soil, then for the first time the law of that foreign soil comes upon the scene. To take the example last employed: AB's domicil upon French soil is, upon the English conception of International law, sufficient to cause the law of the French soil to apply to his movable succession. It is not necessary that he should live in a château, or possess any goods in France, or have been authorised by the French Government to acquire a domicil in France: no English rule attributes any significance to these things. The only essential matter is the fact which in

English legal phrase is summarised as "domicil in France." If AB was, at death, "domiciled" (*sensu Anglicano*) in France, his movable succession will be regulated according to the rules which French law would apply to a movable succession which it deemed governed by French law. In the given case, if AB had not obtained a governmental authorisation to settle in France, French law "in its totality"—including, *i. e.*, its rules of I.P.L.—would not deem his movable succession to be governable by the "territorial law" of France; this is, however, immaterial in this case and for the following reasons. (i) It is for the English court, interpreting or stating the rules of I.P.L., to say what fact is adequate to justify the given reference to French law; this implies that it is not for French law to pronounce upon the adequacy in question, *i. e.*, all French rules as to I.P.L. are excluded. (ii) When English law, declaring domicil to be, in its eyes, an adequate tie between person and territory for the purposes of the international law of inheritance, is silent about other special ties (*e. g.*, domicil authorised by government), it impliedly excludes them, and the exclusion is final.

The ultimate cause of the application of French law to AB's movable succession is the English rules of I.P.L.; the proximate cause is the relation of domicil between AB's person and French soil. French law is not invited to say whether, upon its own principles, it ought or ought not to apply, at any rate so far as this depends on questions of legal space; it is only invited to say, upon the assumption that all questions of legal space have been settled in favour of its application, how it would distribute the goods in question.

If AB were a Roman Catholic and French successory law (like the Austrian law of Divorce) contained separate provisions for Roman Catholics, this, being an internal French rule, would be recognised in England.[1] Even this, however,

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[1] What if the rule simply declared that the successory law of the Code Civil was not to apply to such a case, without saying what law was to apply? On principle, and having regard to the reasons at the bottom of the selection of the *lex domicilii*, it would seem that the prohibition should be neglected.

might be challengeable if the case of Roman Catholics was by French law referred to the law of some non-French legal area, for this might be construed as the reintroduction of those juridico-spatial considerations which *ex hypothesi* have been eliminated. This extreme suggestion serves the practical purpose of showing that, in the solution of a problem like that relating to AB's inheritance, no regard is to be paid to those principles of foreign law which, *beyond doubt*, are based upon considerations relating to legal space. This means the exclusion of all foreign doctrines which are in substance doctrines of I.P.L. or rules of competence in space.

It remains to add, in order to give actuality to these speculations, that a principle which purports to control the operation of a law by reference to nationality or to authorised-domicil is a principle of the kind referred to, in the last sentence but one, as "based on considerations relating to legal space." This is as obvious in the case of nationality as in the case of authorised-domicil, and needs no demonstration beyond that which is contained in the statements that sovereignty is territorial, and that the legal areas for the purposes of public law and the legal areas for the purposes of private law, either alone or in groups, are in the nature of things identical. The Italy which is the seat of the law of Italy, and the Italy to which a person may be bound by such a tie as to constitute him an Italian, are the same Italy and, for fundamental reasons of legal philosophy, must be. And when, as sometimes happens, continental lawyers have to say what is the national law of a given British subject, they, failing to find a civil system which can be called the British, adopt, as his LNat., the law of that legal area within the British Empire with which the British subject in question is most connected.[1]

[1] *See, e. g.*, Clunet, 1901, p. 905: a Spanish court dealing with the succession of a *sujet écossais*, domiciled at Barcelona, referred in the first instance to the Scottish law as the law of his nationality. Spanish law determines internal Spanish nationality by reference to the Spanish province of origin. See Bartin, *Rev. de Dr. Int.*, Vol. XXX, pp. 296–7. In *In re Johnson* the judge arrived at the conclusion that the law of the domicil of origin was, in the case of the British subject in question, to be taken as the law of the nationality: query, whether he would have looked to the law of an actually existent domicil of choice within the British Empire, had there been a domicil of choice.

39. When English law, then, refers a matter to a foreign law, the matter is referred to that foreign law considered as strictly territorial, in exclusion of the "international" rules adopted by that foreign law. That such a notional[1] reference may be a reference of a strictly limited character is not only conceivable in theory but is necessary in practice. If, *e.g.*, the matter related to property in England, the reference to a foreign law would be made with the reserve that the English pronouncement on the question whether the property was movable or immovable was to be final: and in the result that foreign law might be notionally applied in circumstances in which it would itself refuse to apply. This may happen whenever the quality of a legal institute or relation is susceptible of being differently appreciated in different systems. Examples of such differences are the following: consent of parents to a child's marriage is in France a matter going to the essential validity of the marriage; in England it is treated as a matter of form. The Common law rights of a widow in the property of her deceased husband may from one point of view be considered as part of matrimonial law, from another as part of successory law; so may the English rule whereby marriage revokes a will. The title by which goods of a deceased who has left no heirs vest in the State, may be variously treated as succession or as occupation (of a *res nullius)* or as a naked manifestation of sovereignty. The rule of the law of the Netherlands, which forbids its subjects to make a will in holograph form, may be classified as matter of capacity or as matter of form, and so on. Now, if the law of State A refers to that of State B a question involving an ambiguous element of the character just exemplified, it is obviously justified in making its own solution of the ambiguity a term in the reference. That it not only may, but often must do so, is shown by the following illustration: suppose a French court to be dealing with a

[1] How completely notional that reference may be is shown by the cases where a foreign law of succession is applied to goods in England, although the deceased left no property within the domicil. *See* 2 Add., p. 25, approved by Cottenham, L.C., in 4 Myl. & Cr., p. 83.

will made in Italy by a Dutch subject in holograph form; French law refers matters of capacity to the law of Holland, matters of form to that of Italy: the question whether the rule of Dutch law forbidding Dutch subjects to make holograph wills is one of capacity or one of form, cannot be included in the reference but must be settled by the French law,[1] if only because the laws of Italy and of Holland might differ thereon.[2] When, then, a reference is made by the law of England, in virtue of its rules of I.P.L., to the law of another system, with which it is in disagreement not as regards the category in which a given legal relation is to be placed but as regards the principles determining the operation of laws in space, there is nothing exceptional in the reference being made with a reserve: the reserve is that all questions concerning the proper law to be applied, so far as considerations of space are concerned, have been settled in the English sense. Indeed, as it is only because of that settlement that the individual foreign system has been selected, English law would stultify itself if it were to allow the question of space-considerations to be reopened.

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[1] The French courts have held the rule to be one of personal capacity, *see, e. g.*, Clunet, 1904, p. 166; on p. 169 the juridical reasons of this analysis are given.

[2] A closely analogous question came before the Privy Council in 1892. An action was brought in Canada on a judgment obtained in New York. The Privy Council held that the Canadian court ought to form its own opinion whether the action in New York was penal or not, and that it was not bound by the interpretation put upon New York laws by the courts of New York.

"Their Lordships cannot assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the (New York) Statute of 1875 in the State of New York. They had to construe and apply an international rule, which is a matter of law entirely within the cognizance of the foreign court whose jurisdiction is invoked. Judicial decisions in the (foreign) State where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The (British) court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State. Were any other principle to guide its decision, a court might find itself in the position of giving effect in one case and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal." *Per* Lord Watson, in giving the judgment of the Privy Council in *Huntingdon* v. *Attrill* (1893, A. C., at p. 155).

Discords such as those just mentioned, whether they arise, on the one hand, in the analysis of jural conditions and relations, or, on the other hand, in the adjustment thereof under considerations of legal space, are fundamental and irresoluble, and no system can be taxed with want of international comity on the ground of its adherence to its own analysis and its own rules of adjustment.

40. The rules of I.P.L. adopted by one legal system differ sometimes from those adopted by another. Hence two results necessarily follow: (i) a matter is sometimes *not* referred to a given legal system when that system would deem that it ought to be (*e.g.*, the formal validity of a will made in France by a Frenchman domiciled in England, is, by French law, determined by reference to the law of France, while the English law would determine it by reference to the law of England); and (ii) a given matter *is* sometimes referred to a given legal system when that system would deem that it ought not to be (*e.g.*, the marriage-capacity of a Dane, domiciled in Italy, would in England be determined by reference to the law of Italy, even though the law of Italy desires that the marriage-capacity of a non-Italian shall not be governed by the law of Italy, but by that person's national law). Each of these two results is the natural outcome of the existence of divergent principles of I.P.L.; the former result is accepted as such, but the latter is, by some, regarded as so anomalous as to justify the doctrine that any positive reference to a given system must be a reference to that system "in its totality." Unless (so the objection runs) the rules of I.P.L. adopted by that system be taken into account, its application to any given case may be against its will. Underlying this objection is a radical misconception of what is meant by "referring" to a foreign law—a misconception of such importance in connection with the Renvoi-question as to call for some detailed consideration.

It is axiomatic that one legal system cannot operate *as law* outside the area ruled by the sovereign in whom it lives and moves and has its being. When it is said that, under the

English principles of International law, a matter is "referred to" or is "subject to" a foreign law, or that a foreign law is to "apply," or to be "recognised," the inevitable condensation of phraseology may, for a moment, obscure the fact that no law can operate, as law, in England other than the law of England and (or including) its rules of I.P.L. If a French law penetrates into England, it does so as Fact only, just as a French coin can only penetrate into England as a coin: the foreign coin can only become money by becoming English money *pro hac vice*, and the foreign law can only be law in England by being (so to say) energised from Fact into Law by the breath of English sovereignty. Thus the law of France admits *force majeure* as a valid defence in an action for breach of contract, and, if the law of England, holding that a given contract ought by (English) rules of I.P.L. to be governed by the law of France, admits *force majeure* as a good defence in the particular case, this does not mean that French law, as an activity, is operating in England, or that French *law* is rendered competent on English soil. On English soil English law is in all cases supreme, omni-competent and exclusively competent. In the exercise of this supremacy and competence it suspends, on occasions, its internal rules and applies its "international" rules; and when such an occasion arises, it receives as part of the facts upon which it is to make a pronouncement, not only the decisively "foreign" fact which has called for the suspension of its internal law, but also so much of the law of the "foreign" area where that fact resides as actually has been there applied, or is there applicable. This foreign law, whether it takes the applied form of judgment or the pure form of legal proposition, comes into the domain of English law merely as Fact—to be proved and to receive legal appreciation just as other facts.[1] The Will of the foreign sovereign shapes this material, and the English law, in

[1] *Cf. per* Lord Ellenborough in *Potter* v. *Brown* (1804, 5 East, p. 131). "We always import together with their persons the existing relations of foreigners as between themselves according to the laws of their respective countries."

"In any case the (insurance) office may have to settle for itself doubtful and complicated questions of fact, and there is nothing more in having to ascertain the law of a

selecting this material and in withdrawing its own rules in order to make room for it, renders so far a homage to the *expression* of that will; but the only will that can receive *execution* in England is that of the English sovereign. To recur to the example last employed: it is by virtue of the Will of the French lawgiver that *force majeure* serves as a defence in his law, but the question whether in any particular case the law of England, in compliance with (its) rules of "international" law, shall substitute[1] for its own rule on the subject the *fact* that the French rule is as stated, does not depend on the Will of the French lawgiver at all. Even if the answer

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foreign country than in having to ascertain whether the assignment was in fact *bonâ fide* or for good consideration." *Per* Wills, J., in *Lee* v. *Abdy* (1886, 17 Q. B. D., p. 315).

Cf. also *Leslie* v. *Baillie* (1843, 2 Y. & C. C., p. 91). In that case an English testator had bequeathed a legacy to a married woman who was domiciled in Scotland. The husband died shortly after the testator, and the executors of the testator, with full knowledge of the Scotch domicil, subsequently paid the legacy to the widow, and not, as Scotch law required, to the representatives of the husband. In an action brought in England by these representatives, it was held that the executors were not liable unless they had express notice of the law of Scotland on the matter. Knight Bruce, V.-C., said, "I view this case as if the married lady, at "the time of her marriage, had, instead of marrying, made an assignment of the legacy; in "which case, if the executors without notice of the assignment had paid her the legacy, "the payment would have been good" (p. 97).

In this way English law may itself be Fact and not Law even in England. Let us suppose that an Englishman by nationality dies domiciled in Belgium and intestate, and that he leaves movables in France. It is conceivable that these movables may be distributed in France in accordance with English law as LNat. If so, and if these goods later on find their way into England, they will (so it is submitted) be part of a duly distributed succession, and the English statutes of distribution will be merely part of the facts out of which the successor's right was generated.

[1] *Cf.* Lord Brougham's *dictum* in H.L., sitting as a Scotch court: "Great embarrassment may no doubt arise from calling upon a Scotch court to apply the principles of English law to such questions. . . . . Nevertheless this is a difficulty which must of necessity be grappled with, because in no other way can the English law be applied to personal property situated locally within the jurisdiction of the Scottish forum. . . . . The Scotch court must inquire of the foreign law as a matter of fact. . . . . But here I think the importing of the foreign Code (sometimes incorrectly called the *comitas*) must stop." *Yates* v. *Thomson* (1835, 3 Cl. & F., at p. 585).

"I take the rule to be universal that foreigners are in all cases subject to the laws of the country in which they may happen to be; and, if in any case, when they are out of their own country their rights are regulated and governed by their own laws, I take it to be not by force of those laws themselves, but by the law of the country in which they may be adopting those laws as part of their (*sic*) own law for the purpose of determining such rights." *Per* Turner, V.-C., in *Caldwell* v. *Van Vlissingen* (1851, 9 Hare, p. 427).

"The law of England may possibly, for the purpose of deciding upon the validity of this script, adopt the law of another country." *Per* Dr. Lushington, giving the judgment of the Privy Council, in *Croker* v. *The Marquis of Hertford* (1835, 4 Moo. P. C., p. 357).

"It is true that in many cases the Courts of England inquire into and act upon the law of Foreign countries as in the case of a contract entered into in a foreign country, where, by express reference or by necessary implication, the Foreign law is incorporated with the contract, and proof and consideration of the Foreign law, therefore, become necessary to the

be in the affirmative (*i. e.*, if the "proper law" of the contract be held to be French) it will not be as *law* that the French rule will arrive in England; the Will which initially vivified it will die out of it when it leaves its native area. In no case, then, is it possible to assert that a foreign *law* is made to apply against its will: the law that has a will, *i. e.*, the living, dynamic, law, cannot go abroad.[1]

41. It is in support of the doctrine that a reference to a foreign law must be a reference to that law "in its totality," *i. e.*, in support of the Renvoi-theory, that the objector says, "Were it otherwise, a foreign law might be made to operate "against its will." That this objection rests on a misconception has just been shown: it may now be added that what is mistaken for a case of seeming coercion is in reality quite different and lends no support to the Renvoi-theory. Let us imagine that the English law is considering the validity of a

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construction of the contract itself. And as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English Court admits the proof of the Foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established." *The Halley* (1868, L. R., 2 P. C., p. 204). *Per* Turner, L.J.

"The English law for certain purposes, of which the present purpose is one, incorporates the local law of Zanzibar." *Per* Lord Hobhouse, giving the judgment of the Privy Council, in *Sec. State* v. *Charlesworth* (1901, A. C., at p. 385).

[1] Since the above was in type the writer has found a gratifying corroboration in the following passage written by M. de Vareilles Sommières in *Rev. Crit. de Législ. et de Jurispr.* 1903, Vol. 31, p. 393, *et seq.* "Elles (*sc.* les lois étrangères) n'y commandent même qu'on reconnaisse la validité de l'acte et de l'existence des droits qu'il a engendrés, car, ce qui le commande, ce ne sont pas elles, muettes et sans volonté sur ce point, ce sont des principes de droit naturel qui font corps avec toutes les législations du monde . . . . c'est donc la législation même du pays à la porte duquel frappe le droit né à l'étranger.

On le voit, la loi étrangère ne sort pas de son domaine: elle ne commande et n'oblige que chez elle; elle n'est obéie, appliquée que chez elle. Ce n'est pas elle, c'est le droit né chez elle qui, à l'occasion, pénètre dans les autres Etats et y reçoit une exécution extra-territoriale. Ce que nous voyons se produire dans ces Etats, ce ne sont pas les effets d'une *loi* étrangère, ce sont les effets d'un *droit* né d'une vente, d'une donation, d'un testament effectué à l'étranger. . . . . Bien qu'une grand'mère soit assurément pour quelque chose dans l'existence de son petit-fils, on ne peut pourtant pas dire que les faits et gestes du petit-fils soient les faits et gestes de l'aïeule, et que si celui-là est reçu dans un Etat, celle-là y entre avec lui.

Ce n'est pas exécuter une loi que de tenir compte de ses applications passées.

Nul ne dira que, dans un Etat, une loi abrogée s'applique encore parce qu'on ne tient pas pour non avenues les applications qu'elle a reçues dans le passé. On ne peut pas davantage dire qu'une loi étrangère s'applique dans un Etat parce qu'on respecte les applications qu'elle a reçues chez elle."

will made by a Dane domiciled in Italy, and aged 20: the decision, if given on traditional lines, will be that his capacity is determined by the testamentary provisions of the law of Italy, and therefore commences at 18. As the Italian code contains a provision that the capacity of non-Italians is to be regulated by their national law (in this case the law of Denmark, which confers testamentary capacity at 21), it might seem as if the law of Italy were made to apply against its will. In the light, however, of what has been said in the preceding paragraph, it is clear that the complaint can only mean that the testamentary provision of the Italian code, having been imported into England, is in England put to uses not contemplated by the law-maker who framed it; he, it might be said, was legislating for Italian subjects only, *non constat* that a provision meant also for Danish subjects would have been, materially, the same. Any objection on that ground is, however, clearly for the importer and not for the native manufacturer: it happens, however, that the importer has got exactly what he wanted, *i. e.*, the legal material manufactured in Italy for home-consumption in determining testamentary capacity. The importer wants just that article because of the considerations local to Italy (*e.g.*, domicil in Italy), which, in the particular case, render it, in his opinion, jurally correct to replace the material provisions of the law of England by those of the law of Italy.

42. It is sometimes said that I.P.L. systematises the extra-territorial recognition of rights: in so far, however, as this description may suggest that State A never recognises the law of State B except where a right already and actually exists under the law of State B, it is a dangerous description in connexion with the Renvoi-discussion. This conception of I.P.L. would be perfectly satisfactory if all systems adopted the same rules for the solution of the problems of legal space: but, as it is divergencies in that respect which have produced the Renvoi-question, the conception in question may prove misleading. Further, it may be questioned whether, the dissonances of international rules being what they are, it is a

conception of real value to the English lawyer, whose rules of I.P.L. so often lead him to regulate the various elements of a jural relation—Form, Capacity, Substance—each by reference to a different system: in such a state of things the English courts may have to recognise rights which no individual external system has generated. The justification of this, and of the kindred fact that English courts often seem to impute to a foreign system a legal determination which in the actual case that foreign system would not make, is the following consideration: *When once a jural relation, or an element therein, is perceived to be outside the dominion of the law of England, it is deemed by English courts to be in the dominion of International law and not in the dominion of any other legal system.*[1]

If the English courts are dealing with a marriage which was celebrated in France, and if in consequence they apply

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[1] It is not of course suggested that all *dicta* of English judges are consistent with this doctrine. Numerous citations might be made which seem opposed to it, as, *e. g.*, *per* Lord Eldon (1824, 8 Sim., p. 314), "If the law of England be such that I ought to apply the law of France, etc.," and the often cited remark of Lord Stowell, in *Dalrymple* v. *Dalrymple* (1811, 2 Hagg. Ecc., p. 54):—

"Being entertained in an English Court, (the cause) must be adjudicated according to the principles of English law applicable to such case. But the only principle applicable to such a case by the law of England is that the validity of Miss G.'s marriage rights must be tried by reference to the laws of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland."

It does not, however, unduly strain Lord Stowell's language to interpret it as meaning that the legal situation before the English courts is not one in which a question arises for the cognisance of internal English law as to whether Miss G.'s marriage-rights were duly acquired or as to their character, those legal questions being for the Scotch law, but that the situation before the English courts is one in which duly acquired marriage-rights of a certain character are among the facts of the case. In *Doe* v. *Vardill* (1835, 9 Bli., N. S., p. 45; 2 Cl. & F., p. 574) Alexander, L.C.B., took this view of Lord Stowell's *dictum*. In just the same way, *e. g.*, the facts of the case in *Rothschild* v. *Currie* (1841, 1 Q. B.), included not merely a dishonoured bill, but a dishonoured bill on which notice had been duly given: and this, it is suggested, is what Lord Denman meant when he said (p. 51):—

"We are of opinion that the French law regulated the time of giving notice of this dishonour; and, as the notice was given in due time according to that law, our judgment must be for the plaintiff."

Cf. also:—

"I have nothing to do, as I apprehend, with foreign law. I am to administer the English law; and I apprehend it is now clearly established by a great variety of cases . . . . that the rule of law is this, that where a person dies intestate, his personal estate is to be administered according to the law of the country in which he was domiciled at the time of

French rules as to the requisite formalities, it is not correct to say that the formal element of this marriage is deemed by the English courts to belong to French jurisdiction—it belongs to the International area, and it is in obedience to its rules of I.P.L. that the English court admits proof that the international requirements as to form have been complied with. Not even when every element of the marriage is French, and valid by French law, is it correct to say that a French marriage as such is recognised in England as a marriage. The only marriages which are recognised in England are those which are valid by English or by international law: English courts no more admit that a given marriage is valid merely because French law says so, than they give execution to a French decree of divorce when they admit that each of the parties to the dissolved marriage can marry again. Both the marriage while it existed and the divorce are merely data, of French origin: I.P.L. will tell the English judge whether the data are material or immaterial.[1]

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his death, whether he was a British subject or not." *Per* Shadwell, V.-C., in *Price* v. *Dewhurst* (1837, 8 Sim., p. 299).

"The Court of Session appears to have taken a very correct view of the international law upon the subject in considering the law of the country where the debt is contracted, as furnishing the rule by which the nature and extent of the obligation are to be tried." *Per* Cottenham, L.C., in *Fergusson* v. *Fyfe* (1841, 8 Cl. & F., at p. 140).

"It is not, however, correct to say that, with regard to the distribution of personal property, the law of England gives way to the law of a foreign country; but that it is part of the law of England that personal property should be distributed according to the *jus domicilii*." *Per* Abbott, C.J. (1826, 5 B. & C. 451), cited with approval by Page Wood, V.-C., in *Campbell* v. *Beaufoy* (1859, Johns., p. 326).

"*By International law*, as recognised in this country, those children are legitimate whose legitimacy is established by the law of the father's domicil." *Per* Kay, J., in *In re Andros* (1883, 24 C. D., p. 642). The operative *law* is here International law: the materials only are supplied by the foreign law.

[1] "In order to sustain the competency of the present suit, it is necessary for the appellant to show that the jurisdiction assumed by the district judge of Matava was derived either from some recognised principle of the general law of nations or from some domestic rule of the Roman Dutch law. If either of these points were established, the jurisdiction of the District court would be placed beyond question; but the effect of its decree divorcing the spouses would not in each case be the same. When the jurisdiction of the court is exercised according to the rules of International law, as in the case where the parties have their domicil within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilised country. . . . . On the other hand a decree of divorce *a vinculo*, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interest of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority." *Per* Lord Watson, in giving the judgment of the Privy Council, in *Le Mesurier* v. *Le Mesurier* (1895, A. C., p. 527).

When once an element in a jural situation has been ascertained to be non-English, the English law refers it to a theoretical International law: this fact is of some importance if only to meet the reproach sometimes addressed to us that our system "considers all the laws and statutes of the world as an appendix to our local law." Not so: when a legal element is outside our own competence we purport to refer it to a universal system, a system to which our own law and other laws are assumed to do equal homage, and in obedience to which, indeed, we make the initial admission that the element in question is outside our competence. In this system the very rule which tells us that the matter does not belong to us, tells us to whom it does belong—and we obey the system. It is a system which has descended to us from a time when its fundamental assumption of universality was a tenable assumption, and it works: those are its credentials. That it is not a system which would be inaugurated *de novo* may be admitted; but it seems equally clear that its scientific defects are not curable by a wholesale admission of the Renvoi-theory. For the English law to accept a Renvoi to itself, in the proper sense of the word "Renvoi," would be to commit logical suicide, since it would mean the abrogation of a rule, founded on considerations of comity and justice, at the bidding of a foreign law whose sole claim to be heard rests upon the rule itself: and for the English law to accept a Renvoi to itself on the principle of *désistement* would mean that the more extended became the divergence between English and foreign rules of I.P.L., so much the oftener would internal English law be applied to matters which it believes outside its competence.

43. In order to meet the objection that English law, if it refuses the Renvoi-doctrine may be applying a foreign law against the will of that law, it has been shown in the foregoing pages (1) that principles of territorial sovereignty prevent a foreign law from operating as law in England, and (2) that any seeming coercion of the foreign system is applied not in the name of English but of International

law ; each proposition supports the doctrine that foreign law takes the shape of Fact when it comes before an English court. This doctrine may now be fortified by other considerations derived from the actual working of the English system. Of these, the most suggestive is, perhaps, that which relates to the operation in England of a foreign judgment.[1] A judgment rendered by the competent foreign court has no effect, as such, in England ; but it is held to generate in England an obligation, *quasi ex contractu*, or, as it is sometimes put, a contract implied *in the (English) law*, though even this obligation may conceivably be displaced when it comes before the scrutiny of an English court. The judgment evidently comes into England as a fact alone.[2] When, however, the foreign law which the English rules of I.P.L. indicate as the proper law to govern any given matter, has not rendered a judgment thereon, the English law inquires for the materials upon which it presumes that a judgment, had there been one, would have been rendered.[3] Arguing *à fortiori* from the case where a judgment has been rendered, we see that these materials also are inquired for, not as

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[1] "We think that . . . . the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke, B., in *Russell* v. *Smyth*, 9 M. & W. 819, . . . that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action." *Per* Blackburn, J., *Schibsby v. Westenholz* (1870, L. R., 6 Q. B., at p. 159).

[2] Note that the English court will sometimes recognise a right arising from a foreign judgment even when the foreign law in question would not do so. See *Pemberton* v. *Hughes* (1899, 1 Ch., p. 790).

[3] "No principle can be better established than that the administration of the personal estate of a deceased person belongs exclusively to the country in which he is domiciled at his death. The Courts of that country must decide who is entitled, and from their decision there can be no appeal. It does not always happen, as is the case here, that the claim of the party litigating in our Courts has been actually raised and decided in the Courts of the country of the domicil. It is, therefore, often matter of necessity that our Courts should receive evidence from learned foreigners as to what the law of the domicil is. Such evidence is in general far from satisfactory, but it often happens that no better evidence can be obtained, and then the Courts here must ascertain, from conflicting testimony, as well as they can, what the law is on which they must act. But here we are left in no doubt. The title of the respondent has been fully adjudicated upon by the Courts of his domicil after long and careful consideration, and by their decision we are bound." *Per* Lord Cranworth, *Doglioni* v. *Crispin* (1866, L. R., 1 H. L., p. 314), cited with approval by Stirling, J., in *In re Trufort*, *supra*.

law but as fact. And just as a foreign judgment is not allowed an indiscriminate effectiveness in England, so also the materials gathered from the foreign law are subjected to the tests of English legal principle: in other words, *an English judge, applying foreign law, does not necessarily apply it as the judge of its native area would.* This is illustrated by such a case as *Lynch* v. *The Provisional Government of Paraguay*, (1871), L. R., 2 P. & M., p. 268. That case related to the succession of a person who had died domiciled in Paraguay. After his death a local law was passed, declaring his property forfeited to the State. The English judge refused to distribute his English movables in the same way in which the judge of Paraguay would have distributed his movables in Paraguay, but declared that the law which was applicable was the law of Paraguay as it stood at the time of the death of the deceased—a law which at the time when it was actually enforced was, as regards the particular case, mere jural material of the same character as the XII Tables.

That the English judge, in applying foreign law at the bidding of his rules of I.P.L., does not place himself absolutely in the same position as the judge of its native area occupies, is also shown by those numerous cases in which English conceptions of public policy[1] and of private justice[2] have been held to prevent the recognition in England of rights duly acquired under a competent foreign system. The same thing is further shown by considerations dealt with on pp. 94–5 and 53–4 of this pamphlet: viz., (i) the English judge must make his own final determination as to the legal quality of a jural element; must, *e.g.*, say finally whether a given item of property is to be considered movable or immovable; it may be that, decreeing it to be movable, he will apply to it a foreign law which itself would deem it immovable. (ii) As the English rules of I P.L. often split up a jural relation into elements to each of which it applies the law of a different

[1] See, *e.g.*, *Hope* v. *Hope* (1856, 8 de G., M. and G., p. 731).
[2] See, *e.g.*, *Kaufman* v. *Gerson* (1904, 1 K. B., p. 591).

country, this will mean that a foreign law is often utilised to produce an ultimate result of which that foreign law would disapprove. While, then, from the standpoint of English law, foreign law in general is Fact, and while certain foreign law, indicated, as occasion arises, by International law, is Fact of a most compelling character in the generation of rights under the English law, even this favoured law is not unconditionally received in England. Rights, duly existing under a foreign law which is the proper law in a given case, do not merely by virtue of their existence as foreign rights obtain recognition in England:[1] a jural appreciation on the part of the English law actually or constructively intervenes. If, then, that scrutiny discloses that the foreign law is implicated with "international" principles which are repudiated by English law, those principles must be eliminated in the English court. The *primum mobile* of the situation is not the existence of a foreign right, but the presence of a fact deemed by I.P.L., as understood in England, to be so decisively foreign as to demand that the English law should withdraw—what? Not its living self, but the *primâ facie* applicability of its own material provisions. Logic, accordingly, demands that what it substitutes therefor should be something of the same order, *i. e.*, the material provisions of the foreign law. This will usually result in what may loosely be called the recognition by English law of foreign rights and foreign legal determinations. If this is not the result, the reason will be that the foreign

[1] See, *e. g.*, *Shaw* v. *Gould* (1868, L. R., 3 H. L., p. 55). XY was validly married under the law of Scotland, where for many years he was domiciled and where the children of the marriage were born. The English court held the children to be illegitimate, because it held that an earlier marriage of XY, contracted in England, was, according to English principles, not dissolved by a Scotch decree of divorce, valid in Scotland.

A further and regrettable illustration is furnished by the doctrine, established in defiance of the great authority of Sir R. Phillimore (see his views in L. R., 2 Ad. & E., pp. 5, 9, etc.), that English courts will not recognise rights based on acts which are actionable torts in the foreign country where they are committed unless those acts are also actionable by English law.

The same thing may be said of the even more regrettable rules adopted in England with regard to legitimation of a bastard by subsequent intermarriage of its parents: as the father must be domiciled at the time both of the child's birth and of the marriage in a jurisdiction which recognises such subsequent legitimation, the concurrence of two foreign systems may be called for though each might deem itself competent alone.

law has adopted "international" rules which differ from those recognised in England: in that case three courses are open to the English law: (i) it may sacrifice its conception of I.P.L. to that of the Foreign law; or (ii) it may adhere thereto at the cost of applying the material provisions of a foreign law in circumstances in which that foreign law would itself not do so; or (iii) it may attempt the elaboration of an entirely new branch of law, that designed to regulate the conflict, not of internal rules, but of rules of conflict. Of these courses (i) is impossible, (ii) accords with the general English idea that in law certainty outweighs many defects in theory, (iii) is that which is preferred by Renvoi-adherents.

VIII.

44. The preceding pages contain a statement of the fundamental doctrines of English law concerning I.P.L., which, if correct only in its main features, will show that the Renvoi-theory is inconsistent with those doctrines. It remains to consider the relation to general principles of the special cases set out on pp. 9 to 18, in which the English courts have more or less directly dealt with the matter.

There are twelve of these cases and all of them relate to one department of law only, *i. e.*, that of post-mortuary succession to movables. Of the twelve, two are unfavourable to the Renvoi-theory, namely, the cases of *Bianchi* and *Abd-ul-Messih*, but in each of these cases the pronouncement unfavourable to Renvoi was an *obiter dictum*. In eight of the remaining ten the question was as to the formal validity in an English court of a will made in English form by a British subject of English origin, and in seven of the eight the will was allowed to be valid. These cases, in this one province of the legal area, contain *dicta* or decisions consistent with those demanded by the adherents of the Renvoi-theory, but their importance would be grossly exaggerated if it were imagined that in any of them the judge was consciously supporting the theory; with the exception of the last (*Brown-Séquard*, 1894), they were decided before the Renvoi-theory was born. Further, two of these eight cases may be ignored. No. 2 (*Maltass*) contains a *dictum* which is an echo of the judgment in *Collier* v. *Rivaz*, but its facts are not Renvoi facts. The other case which may be ignored is No. 8 (*Lacroix*): decided on an *ex parte* application, it merely shows how accommodating a judge will sometimes be rather than declare a will to be void in point of form: the *dictum* of Lord Watson

in No. 10 (*Abd-ul-Messih*), given on p. 18 hereof, finally disposes of it. Six cases remain, *Collier* v. *Rivaz*, *Frere* v. *Frere*, *Bremer* v. *Freeman*, *Crookenden* v. *Fuller*, *Laneuville* v. *Anderson*, and *In re Brown-Séquard*: in all these, except *Bremer* v. *Freeman*, a will not executed in accordance with the forms required by the internal LDom., to which the English rule referred the matter, was admitted to probate on the ground that it would have been considered formally valid by the tribunals of the domicil, either as complying with the requirements of LNat. or with those of LActus. It is at least arguable that these cases simply decide that the international rule adopted in England with regard to the formalities of a will of movables, is a facultative rule, a rule which allows alternatives, as (in the opinion of many theorists) every rule of form ought to be. At the time when most of these cases were before the courts it was far from settled that the LDom. regulated the formalities of a will of movables: a reference to the Parliamentary debates of the year 1861, upon the Bills which became Lord Kingsdown's Act and the Domicil Act, will show that many eminent lawyers were opposed to that doctrine. The decisions in question broke in on no settled rule. They cannot be employed to base with certainty the general doctrine that an English court, in referring any matter to the law of a foreign country, means to submit it to the rules of I.P.L. adopted there, unless it be shown that in the cases here discussed the will would have been held in England to be void, *even if conforming to the internal law of the country in question*, had it been invalid in point of form under the rules of I.P.L. adopted there. For this there is no warrant and it is highly improbable. Can it be imagined, on the warrant of these cases relating to Form, that if an English subject domiciled in Italy made a will at 20, an age at which by the Ital. LDom. he possesses testamentary capacity, the English courts would, nevertheless, hold the will void on the ground that the Ital. LDom., referring to the English Wills Act as part of LNat., really required a

testator to be at least 21? Does not this illustration show that these cases in which a will is liberally treated in regard of the requisite formalities, stand by themselves and are quite special cases?[1]

Undoubtedly, the *dictum* in *Collier* v. *Rivaz*, echoed in *Maltass'* case, and the inference (see p. 13) which may be drawn from Lord Wensleydale's judgment in *Bremer* v. *Freeman*, go farther than the suggestion of the preceding paragraph. But before it can be admitted that they furnish any justification for the application of the Renvoi doctrine to the material as opposed to the formal branches of the law of succession, their value must be estimated in the light of the general principles of I.P.L. as conceived in England. And even (which the writer doubts) if they survive this test, it would be a bold thing to declare, on the authority of a few unsupported probate cases, that when English law refers any jural relation, whether in the domain of movable succession or not, to a foreign law, the reference is to the law which the foreign judge would apply to the particular case.

This is, however, the declaration which Mr. Dicey seems to make (see p. 22, *ante*). That one of the three cases on which he relies should be that of *Lacroix*, shows the doubtful character of the ground on which he stands: the other two are *Collier* v. *Rivaz* and *Pechell* v. *Hilderley*, hardly adequate warrant for a doctrine so cataclysmic.

It will be remembered that there is another doctrine, for which both Mr. Westlake and Mr. Dicey stand sponsors, relying on certain of the cases now under consideration, namely, that no effect will be allowed in an English court to the acquisition of a foreign domicil, except such effect as is allowed by the law of the domicil (see pp. 21 and 23, *ante*): the relation of this doctrine to the Renvoi-theory, in the *désistement* shape, is clear. Mr. Westlake and Mr. Dicey both cite as authority for it *Collier* v. *Rivaz*, *Bremer* v. *Freeman*, and

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[1] *Cf.* the latitude in point of form allowed to the marriage-settlement in *Van Grutten* v. *Digby* (1862, 31 Beav., p. 561).

Hamilton v. *Dallas* only. In the last-named case French internal law was held to govern the succession of a person who had died domiciled in France without obtaining governmental authorisation for such domicil; the judge, after examination, came to the conclusion that the French law would not regard the absence of authorisation as a bar to its own application, but there is nothing in the Report to suggest that he would have refused to apply French law even had he formed a contrary opinion—there is, indeed, much to suggest that he only went into that question because it had been raised at the bar. The sole basis, then, for the doctrine under review is the *dictum* in *Collier* v. *Rivaz* and the inference drawn from *Bremer* v. *Freeman*.[1] The position seems a little insecure; indeed, only the deserved reputation of the writers named makes it seem tenable at all.

45. The foregoing analysis shows that the *dictum* in *Collier* v. *Rivaz* possesses a considerable, if undeserved, importance in the development of English doctrine. It is, accordingly, worth while to point out that it only supports the Renvoi-theory in its cruder and yet proper signification. If the theory be stated in the more refined form adopted by Mr. Westlake, *Collier* v. *Rivaz* lends no aid, for the judge (see his words on p. 10, *ante*) assumed that the LDom., to which the English law referred, did not "desist," but continued to have seisin of the case[2] although it itself attached no importance to mere domicil. Accordingly, the only support which the theory in its scientific form can find in the cases under discussion is in the somewhat disputable inferences drawn from *Bremer* v. *Freeman* and *Hamilton* v. *Dallas*.

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[1] The Domicil Act, 1861, which was passed shortly after the decision of this case, lends some force to the contention that, despite *Bremer* v. *Freeman*, a foreign domicil will produce its traditional results in England even "in the teeth of" the law of the domicil itself. Sections 1 and 2 seem to suggest that an Act of Parliament and a treaty would be needed if it were wished to prevent (i) a domicil, *de facto* acquired in a foreign country, from producing *some* effect in the domain of succession, and (ii) a loss of English domicil from rendering English law inapplicable to a given succession.

It may be added here that the English court will vindicate what it conceives to be public international law "in the teeth of" a foreign system. See *Wolff* v. *Oxholm* (1817, 6 M. & S., p. 92).

[2] This is even more obvious in *Laneuville* v. *Anderson*, case No. 6, p. 14, *ante*.

Nor does the *désistement* doctrine derive any encouragement from *In re Trufort*, one of the other two cases, remaining out of the ten which seem to countenance the Renvoi-theory. In that case the LDom. referred to by the English rules of I.P.L., declared to apply a third law, LNat.: on the *désistement* theory the English judge should have applied his own law, LFor., but, instead, he accepted the reference to LNat. We turn now to that case.

46. The Renvoi-question belongs to the general problem raised by the reception in civil law of the ideas of authorised-domicil and nationality, and, perhaps, of other elements of discord. So long as the rules of I.P.L. were founded on a general consensus, there was no room for such a reproach as that which, *e.g.*, Schnell (see p. 38, *ante*) casts upon the science in its traditional form, *i.e.*, that the degree of respect vouchsafed to rights duly acquired will often depend on the forum before which they may happen to be challenged.[1] The decision rendered by Stirling, J., in *In re Trufort*, furnishes, almost unconsciously, an escape from this reproach. In that case the English tribunal referred the material validity of a will of movables made by a Swiss subject domiciled in France to LDom.: a treaty existed between France and Switzerland whereby movable successions of the subjects of each State were, in the other, to be regulated by LNat. The English

[1] The writer ventures to maintain that the rules of I.P.L. as received in England are not obnoxious to this reproach to the extent which is commonly believed. Suppose, *e.g.*, a French subject domiciled in England made a will in England in holograph form: that will would be void by English, but valid by French law. If movables situate in France at the time of their late owner's death were subsequently brought into England, it is hard to believe that the persons claiming under the English intestacy would be allowed in an English court to dispute the title of the beneficiaries under the French will, as regards those movables. It is one thing to apply a foreign law against its wishes or to refuse to apply a foreign law which wishes to be applied, in matters within the English jurisdiction; but it is quite a different thing to use the English rules of I.P.L. in order to divest rights duly acquired under a foreign law in matters over which English law had at the time no effective jurisdiction. This is, however, too large a question to be dealt with here.

When conflict-rules conflict, it may, perhaps, seem as if rights duly acquired were being contemned. *E.g.*, an English court would apply Danish and not French law to the succession to goods in England of a French subject dying domiciled in Denmark, and would seem to be contemning rights acquired under the successory law of France, his LNat. This is, however, the fault of the conflict and not of either of the parties to it.

court, without so much as mentioning the claims of LDom., applied the LNat. to which LDom. referred. This decision, when generalised, yields the following proposition: if the English rules of I.P.L. refer a matter to a foreign law A, and A in its turn refers the matter to a foreign law B, *which accepts the reference*, the English courts will apply the law of B. In this way a marriage, such as that mentioned in the extract from von Bar's article, given on p. 44, *ante*, will be held valid in England: it was a marriage celebrated in France in French form between two Austrians, both domiciled in France; all questions of marriage-capacity would, in accordance with the rules of I.P.L. observed alike in France and in Austria, be settled by the law of Austria, and we suppose that by the law of Austria the parties are capable of intermarrying, although they would be incapable by the internal law of France. If the English court were to pronounce on the validity of this marriage by reference to its traditional rules of I.P.L., it would here have to declare void a marriage rightfully deemed valid by the parties for perhaps a quarter of a century. The rule for which *In re Trufort* is an authority avoids this result and saves us from disturbing the rights which the parties had every reason to believe duly acquired. Again, according to *In re Trufort*, the successions to which Schnell refers in the passage summarised on p. 37 hereof, would be regulated in an English court just as they were regulated at the time of the death of the deceased in the place where those successions were respectively opened. Alike in the case of the marriage and of the successions, English internal law disclaims all application: the law of A which is deemed applicable under the English rules of I.P.L. makes a similar disclaimer, and would apply the law of B, which accepts the reference: on traditional lines the English court would be led by its rules of I.P.L. to ignore the disclaimer on the part of A: it makes, however, a prudent compromise, recognising the alteration in the international situation which has taken place since its rules of I.P.L. were elaborated.

It pays a common-sense homage to accomplished facts in which it is not personally interested. When, however, the case is one in which it is personally interested, or the facts are (so to say) not accomplished, the compromise will be impossible: this needs a word of explanation. If the question before the English court is as to the material validity of a marriage between two Danes domiciled in France, the *Weiterverweisung* by the French law is to a law, the Danish, which, unlike the law of B in the preceding example, may be supposed not accept the reference: there are no accomplished facts to recognise, other than those accomplished under the traditional English rules of I.P.L. *A fortiori* if the parties to the hypothetical marriage were British subjects of English origin, there would not only be no other accomplished facts to recognise, but the English law would be personally interested, inasmuch as by the very act of remitting the question in the first place to the law of France, it has declared that its principles forbid the application of English law. The *Weiterverweisung* admitted in *In re Trufort*, affords not the least pretext for the admission of *Rückverweisung*. In the former, the English court applies its rules of I.P.L., but with a liberal interpretation thereof; the latter means that the English court repudiates its rules directly a foreign judge is pleased to be displeased with them and that a foreign law which is called as a witness is allowed to sit as a court of appeal.

47. Up to the end of the 19th century the matter, accordingly, stands as follows:—

(i) In support of the doctrine, fertile of impossible situations, that when an English tribunal is bidden by its rules of I.P.L. to apply the law of a foreign country, it is to apply whatever law the foreign judge would apply to the particular case, there are cited only such cases as *Collier* v. *Rivaz*, which do not decide more than that formal validity will not be denied in England to a will deemed valid in point of form by the law which governs its material validity.

(ii) Text-writers have laid down the doctrine, (not unreasonable in itself if the legislator were writing on a clean slate), that an international rule bidding an English judge to apply LDom. is only to be followed so far as it is actually accepted *inter gentes;* in favour of this doctrine there is only the inference which may be drawn from *Bremer* v. *Freeman.* Against the doctrine is not only the *dictum, obiter* but considered, of Lord Watson (13 A. C., p. 444; see p. 18, *ante*), but also, subject to the following postulates, the momentum of the whole body of English international case-law: the postulates referred to are (a) that a non-English element in any jural relation cognised by the English courts, is governed not by French, German, etc., *law* but by a law which is called International and assumed to be universal; and (b) that if this assumption is false in fact it is of too fundamental a character to be affected by the maxim, *Cessante ratione legis cessat lex ipsa.*

(iii) When International law as conceived in England bids an English tribunal apply the law of a foreign country which, disclaiming applicability because of the shape taken either by its rules of competence or by its rules of I.P.L., refers the matter to the law of a third state which accepts the reference, there is authority for the application in England of this last-named law. The authority is *In re Trufort,* subject to any weakening effect produced by the *obiter dictum* in the case of *Bianchi* (see p. 15, *ante*): *In re Trufort* related to the distribution of a movable estate on death, but substantial reasons of propriety may be adduced for extending the underlying principle to the regulation of every jural relation, *e.g.*, for recognising as valid in England a divorce pronounced abroad not by the courts of the marital domicil but by the courts of a country deemed competent by the law of that domicil.

48. Suppose, then, that at the end of the 19th century the following case had come before an English court :—A British subject whose domicil of origin was Maltese left Malta in 1832, at the age of 22, and took up her permanent

residence in Baden, living there until her death in 1894. She died intestate, leaving movable goods in England. How are these goods to be distributed?

The answer is, "According to that law of Baden where she had lived for the last 62 years of her life, which corresponds to the English Statutes of Distribution." If an authority be demanded for a solution which seems elementary, the following words of the late Lord Watson may be quoted (13 A. C., pp. 437, 439):—

"It is a settled rule of English law that civil status with its attendant rights and disabilities, depends, *not upon nationality but upon domicil alone;* and, consequently, that the law of the testator's domicil must govern in all questions arising as to his testacy or intestacy, or as to the rights of persons who claim his succession *ab intestato* . . . . In most, if not all of these (books) from the Roman Code (10, 39, 7) to Story's *Conflict* (sect. 41), domicil is defined as a locality—as the place where a man has his principal establishment and true home. Probably Lord Westbury was more precisely accurate, when he stated, in *Bell* v. *Kennedy* (L. R., 1 H. L., Sc. 320), that domicil is not mere residence, 'it is the relation which the law[1] creates between an individual and a particular locality or country.' The same learned Lord, in *Udny* v. *Udny* (L. R., 1 H. L., Sc., 458), speaking of the acquisition of a residential domicil, said: 'Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time.' According to English law, *the conclusion or inference is, that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity, upon which his majority or minority, his succession, and testacy or intestacy must depend.*"

To this solution an opponent may reply, "That is all very well, provided LDom. takes the same view and wishes to apply. But in the present case the law of Baden does not wish to apply: it regulates succession by LNat., and the deceased was not a political subject of Baden. She had not therefore obtained such a domicil in Baden as would 'attract' to her the local law of succession." The answer to this objection is, "You have been misled by the somewhat clumsy shape of the second sentence quoted by Lord Watson from

[1] N.B.—He means International Law, not the Law of the Domicil. The distinction is of the utmost importance.

Lord Westbury. The meaning is, that given a certain fact and a certain intention, the English court is bidden by its rules of I.P.L. to draw the 'conclusion or inference' that the municipal law of a certain country applies to a certain succession: the consent of the lawgiver of that country to this employment of his enactments is no factor in the situation. By virtue of a higher law than any foreign municipal law the concurrence of Fact and Intention generate domicil, and the 'conclusion or inference' in question is part of the import of this legal conception."[1]

We may next imagine the objector to fall back on a line of argument such as the following:—"Well, waiving this objection, and assuming that the Baden law as LDom. is deemed in an English court to obtain a notional seisin of this succession, still the Baden law requires that in this case LNat. shall be applied." This position can easily be demonstrated to be theoretically unsound, and it is not worth while to do more than hearken to von Bar saying "*circulus inextricabilis*"[2] (see p. 50, *ante*). If, however, theoretical

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[1] That a person can be domiciled in a country which has no successory laws for his case, is implied in *Bremer* v. *Freeman*. That the local laws of a country are immaterial in determining whether a person is domiciled there, is distinctly laid down in *Hamilton* v. *Dallas*. See also *Somerville's* case (5 Ves. jr., p. 791), where it is held that there cannot be two domicils for the purposes of succession, and *Pechell* v. *Hilderley*, where it is held that the precepts of two countries cannot be applied to the same succession.

[2] It will not have escaped the reader's notice that this and the preceding objection represent the substance of the judgment in *In re Johnson* (p. 19, *ante*). The learned judge said in that case (p. 827), "It would be impossible for me to hold that this results in a *circulus inextricabilis*." He said it, however, in connexion with the argument which corresponds to the first of these objections: he does not seem to have considered it in connexion with his second line of argument.

In the *Law Quarterly Review*, 1903, Vol. XIX, p. 244, there is a note relating to *In re Johnson* and authenticated by initials which are the same as those of Mr. Dicey. The writer of that note repudiates the decision given by Farwell, J., in favour of the law of the domicil of origin as such, and claims that "the principle to be adhered to was that the goods of the "deceased in England ought to be distributed in the same way in which the Baden courts "would have distributed or, rather, did distribute the goods of the deceased situate in "Baden." The present writer submits that this latter doctrine simply opens the door to the Renvoi-problem without presenting any solution of it. If, *e. g.*, the deceased had left no goods in Baden—in which case LDom. would still be applicable (see p. 94, *n.*, *ante*)—the doctrine in question would lose much of its attractiveness.

The opinion maintained in this pamphlet that the proper law to apply is the internal law of Baden involves the further opinion that if (as alleged by "A. V. D." on p. 246, *op. cit.*) English law permits an English executor or administrator, dealing with the succession of a person who at death was domiciled out of England, to hand the movables, after payment of

considerations be banished by mutual consent and the objector relies on English cases, his little battery—*Collier* v. *Rivaz* and other probate cases—where it does not miss fire is outranged and rendered ineffective by Lord Watson's *dictum* in *Abd-ul-Messih* v. *Farra* (pp. 17 and 18, *ante*).

A third objection, of a very different order, may lastly be imagined: it is that associated in this pamphlet with Mr. Westlake's name. "Your so-called rule of I.P.L. by which LDom. regulates movable succession is unsound. The utmost that your municipal legislator can do is to say that his Statutes of Distribution apply to persons domiciled in England: this will justify your judge in applying to persons domiciled in other countries, not the English statute but the corresponding foreign statute, provided that its area of operation is also determined by domicil. In other cases he has no warrant for applying any but his own law." Logic cannot be invoked against this argument, but only the principle of *stare decisis*. That no English cases give it any support is, however, not final, for it is advanced *de lege ferenda* not *de lege lata*. It seems at first sight to appeal to the convenience of an English judge—to abolish I.P.L. altogether would be still more convenient for him!—but some considerations have been set out on pp. 74–6 which justify a doubt on this point. The Germans have, indeed, adopted, to a limited extent, a somewhat similar principle, but it was by way of deliberate legislation: for an English judge to introduce it in case-law would be uniquely bold and, inasmuch as it is not easy to define the limits within which a principle introduced by judicial legislation is to operate, at any rate coincidently with its introduction, the disturbing effects would be disastrous in the whole area of I.P.L.[1] Moreover, it may be doubted whether the gain on

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debts, to the representative appointed by LDom., it is with the intent that these movables shall be distributed in accordance with the internal law of the domicil and no other.

For a Scotch appreciation of *In re Johnson*, see Appendix.

[1] To take an extreme case, what would be its effect on Section 265 of the Merchant Shipping Act, 1894: "Where in any matter relating to a ship . . . . there appears to be a conflict of laws . . . . . the case shall be governed by the law of the port at which the ship

the side of jural science is accompanied by any gain in substantial justice, when we substitute for the old rule which, *e.g.*, regulates movable succession by LDom. a rule which says, LFor. regulates movable successions except where LDom. consents to apply; or in other words, The Statutes of Distribution regulate in England the movable succession of persons domiciled here and of a large and increasing number of other persons.

Whatever defects exist, either in the character or in the basis of the rules of I.P.L. adopted in England, Renvoi (*Rückverweisung*), is not a possible remedy in its crude form: and in its scientific form it is too drastic. Until the parliamentary draftsman or the diplomatist takes these rules in hand, the words of Lord Cairns are to the point, "In questions of International law we should not depart from any settled decisions nor lay down any doctrine inconsistent with them." (L. R., 1 Sc. App., p. 452.) For those who follow this advice and who assent to the proposition that the only *law* enforced in an English court is English law and International law, the Renvoi question need cause no embarrassment as a scientific problem.[1]

49. The writer suggests, in conclusion, that the English cases in which Renvoi has been admitted may be generalised in a manner which agrees much better with the character of English legal reform than the Renvoi-theory does.

(i) The *Collier* v. *Rivaz* group supports the desirable doctrine that when a jural matter is clothed in formalities which are adequate by reference to the law which, according to English rules, governs its essential validity and its effect, it shall be deemed formally valid in English courts.

(ii) In *In re Trufort* the English court showed such respect for rights deemed to be duly existent by the foreign law to which English rules referred a jural matter which at its

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is registered"? Is this conditional on the law of the port deeming itself applicable? If modern statute-law can tell an English judge to apply a foreign law, without considering whether that foreign law wishes to be applied, why cannot ancient case-law?

[1] *Cf.* Jitta, *Archiv für öffentliches Recht*, Vol. 14, p. 323.

origin was within the exclusive control of English law, as to suggest that the same attitude would be adopted if the court had to deal with rights duly acquired under a foreign law in a matter which at its origin was within the exclusive control of that foreign law, even if English rules would not deem the foreign law in question to be the competent law to deal with that matter.

Conflicts between the internal rules of different legal systems led to the birth of I.P.L.; subsequently developed conflicts between international rules call for similar concessions on the part of the traditional formulæ. It is submitted that movement along such lines as have just been indicated is sufficient for the needs of the case, and that no considerations of respect for foreign systems demand, while many considerations forbid, that English law, in a matter initially within the exclusive control of the English Courts, should be applied to cases to which its traditional rules of I.P.L. declare it inapplicable.

APPENDIX.

I.—In 1894 the Supreme Court of Canada adopted the Renvoi-principle, in a matter of testamentary form (*Ross* v. *Ross*, 25 S. C. Rep., p. 307).[1] The question was as to the validity of a will made in New York by a person domiciled in Quebec: the Quebec law was *locus regit actum*, and the form employed was one, holograph, not recognised by the internal law of New York, although it was recognised by the internal law of Quebec: New York law, however, on its international side, recognised as valid a will made according to the law of the testator's domicil. The case, then, was: Queb. LFor. → N.York LActus → Queb. LDom. The following passage occurs in the dissenting judgment of Taschereau, J. (now a member of the Judicial Committee of the Privy Council):—

"The form that, under Art. 7 of the Quebec Code declaratory of the old law, has to be followed by a Quebecer who makes a will in New York, is the form required by the law of New York for wills by its own subjects, the form generally used in New York, as the last part of Art. 999 of the Code Napoléon reproducing the rule *locus regit actum* expresses in clear terms. And the New York Legislature had not the power to alter that law for the province of Quebec, and to decree that a Quebecer could in New York make his will either according to his *lex domicilii* or to the *lex loci actus*, or to neither one nor the other, but according to a mixture of both, at least so as to affect movables in Quebec.

. . . . . .

"The respondent, in other words, would argue, at least his argument leads to it, that though the legislature in Quebec has refused to adopt the change in the law made in this respect as to holograph wills by Art. 999 of the Code Napoléon or by Art. 1588 of the Louisiana Code, yet the New York legislature has done it for them.

"To so contend is evidently to forget the sovereignty of the province and of the law of the domicil of the testator in the matter and leads to a reasoning in a circle. And a safe rule that I would apply here is the one laid down

[1] See Lafleur's *Conflict of Laws* (Montreal, 1898), p. 14.

by Lord Penzance in a somewhat analogous case, *Pechell* v. *Hilderley*,[1] that in determining the question whether such a will is valid or not, regard can be had to the law of one country alone at a time and the Court will not mix up the legal precepts of different countries. The law of Quebec is exclusively the rule here. But were it necessary to make the inquiry, it seems to me established in the case that the will would be held invalid in New York.

"Mr. Adams, one of the experts examined in the case, makes this point clear, and I do not see that he is contradicted by the other experts.

. . . . . .

"Upon evidence that by the Quebec law a holograph will made in New York by a citizen of Quebec is not valid in Quebec to transmit property real or personal situated or to be found in Quebec if, by the New York law, holograph wills by citizens of New York are not valid in New York, this will in question here would not be admitted to probate in New York.

. . . . . .

"It was said at the argument on the part of the respondent, this will is good by the Quebec law, it is also good by the New York law, why should it not be upheld? This is, however, but an assumption of the very question at issue. That is precisely what has to be determined, whether this will is valid or not: and to such an argument the appellants have only to answer, with not more but with as much force, by saying that as the will is bad in Quebec, and also bad in New York, it cannot be upheld. If Ross had left personal estate in New York, and the New York Court upon contestation of his will had referred the question of its validity to the Quebec Courts, following the course adopted by the Prerogative Court in England in de Bonneval's case,[2] to have the question settled by Ross's *lex domicilii*, the Quebec Courts would have had to answer, and the Court of Queen's Bench concedes it, that by Ross's *lex domicilii*, alone and independently of the New York law, the rule *locus regit actum* imperatively governs, and that this will by that law is therefore null; that by the Quebec law a Quebecer, who in New York desires to make a will disposing of either movables or immovables, or both, in Quebec, must do so according to the New York forms. And as a holograph will is not in the New York form, that would have been the end of the controversy, as Art. 2694 of the New York Code of Procedure, above referred to, expressly says that as to personal estate it is by Ross's *lex domicilii* that, in New York, the validity of his will is to be concluded. I utterly fail to understand the import of the rule *locus regit actum*, if it does not mean, adapting it to this case, that a Quebecer who desires when in New York to make a will has to make it according to the form required by the law of New York for its own subjects; or to put it in other words, if a will in the holograph form made by a New Yorker in New York is void under the New York law in New York, a Quebecer's will in that form made in New York is also void in Quebec, which is Ross's *lex domicilii*."

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[1] L. R., I. P. & D. 673 (see p. 22 n., *ante*). [2] 1 Curteis, 856 (see p. 9 n., *ante*).

II.—In the *Juridical Review* for 1903 (at p. 207) the late Mr. Galbraith Miller discusses the decision in *In re Johnson*. He approves of the result while deprecating the mode in which it was arrived at. The decision, says he, accords with well-established practice in the Commissariot of Edinburgh: in proof whereof he refers to the following passage in Currie on *Confirmation of executors in Scotland*, 3rd Edn., 1902, pp. 23–4:

"By the Law of the Domicil is not necessarily meant the ordinary law of succession in the country where the deceased died domiciled. In several countries the local law is not applied to the succession of foreigners. In Belgium the validity of the will of a foreign testator who may die domiciled there is not governed by the law of that country applicable to its natural-born subjects but by the law of the testator's own country. Where the deceased had died domiciled in Rome, leaving a brother and a widow surviving, but no issue, decerniture was applied for by the brother, on being advised by the British Consul at Rome that the deceased being a British subject the administration would be not according to the ordinary Italian law but according to the law of this country (Aitken, 28th Jan., 1887). Where the deceased had died domiciled in the Argentine Republic evidence was obtained that by the law of that country, unless a person has become a naturalised citizen, which can only be after twelve years' residence, and on special application, his succession is ruled by the law of his native country (McTavish, 19th Dec., 1873). In another case a certificate by the Peruvian Consul at Glasgow was obtained to the effect that the personal estate of the wife of a British subject, who had not become a Peruvian citizen, would on her death fall to be administered in accordance not with Peruvian but with British law (Irving, 25th March, 1881)."

The writer is, however, informed that neither in these nor in any other cases has the Renvoi-question been considered by the Scotch courts.

III.—The writer is informed that the Renvoi-question has not as yet been solved by tribunals in the United States; but in 1873 (*see* footnote to p. 20 hereof), the New York Court of Appeal dealt with one of the related topics. A lady whose domicil of origin was in New York resided in Paris for a long period before her death, but was never authorised by the French Government to establish a domicil in France. She made a will in France in the form required by the

local law of New York but not in the form required by the local law of France. The New York Court of Appeal upheld the will "on the ground that irrespective of the "consideration arising upon Article 13, no domicil in France "was established by the evidence (*Dupuy* v. *Wurtz*, 53 N. Y., "p. 574)." Even if, however, a French domicil *jure gentium* had been established in France, the following passages in the judgment show that the American court would have agreed with the doctrine enunciated by Farwell, J., in the earlier part of his judgment in *In re Johnson*:—

"Unless a new domicil was acquired, the domicil of origin continues and must govern. It must be shown that the deceased has subjected her estate to the law of some other country in order to exempt it from the laws of her own State, and in this connection the reference which has been made to Article 13 of the Code Napoléon becomes important."

The Court then showed how, in the case of Melizet, the French Court of Cassation construed Art. 13, Code Napoléon, in a manner contrary to that adopted by the British Privy Council in *Bremer* v. *Freeman*, and continued:

"The decree of the Court of Cassation states fully the grounds upon which the court reverses the lower court. They are, in brief, that the right to enact laws concerning the transmission of property by succession belongs to every country; that it is the same with respect to laws which establish the conditions and legal effects of domicil, which is nothing more than the place which the Civil law assigns to each person for the exercise of his civil rights: that by the terms of Article 13, Code Napoléon, foreigners are not admitted to the exercise of all civil rights, and consequently cannot acquire a domicil in France with all its legal effects, without having obtained the prescribed authorization to establish their domicil there and continuing to reside there.

"The result of this construction of Article 13 necessarily is to establish that, according to the French law, the will of the deceased would be regarded by the French courts as valid if executed in conformity with the law of her domicil of origin.

"The inquiry into domicil becomes unnecessary if it turns out that, with respect to this individual succession, the law of New York and of France is the same, for when we speak of the law of the domicil as applied to the law of succession, we mean not the general law but the law which the country of the domicil applies to the particular case under consideration (*Maltass* v. *Maltass*, 1 Rob., p. 72)."